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Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
October Term, 1995

SHAWNA SNYDER,

Petitioner,

v.

JOSEPH VIANI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Were petitioner's due process rights under the Fourteenth Amendment violated by the manner in which the Nevada Supreme Court affirmed an adverse summary judgment in her "dramshop liability" wrongful death action against a tavern owner--who illegally sold liquor to petitioner's under-age brother--causing her brother to become intoxicated and, in turn, fatally injured in a highway collision, where:

1. The justice of the Nevada Supreme Court, who cast the deciding vote in a 3-to-2 decision against petitioner, himself owned a tavern and gambling hall which sold liquor, where the justice failed to disclose the ownership to petitioner, and where the justice's liquor and gambling business was enhanced by his decision against petitioner, and

2. The same supreme court justice, in violation of a Nevada statute, sat on petitioner's timely motion for rehearing her appeal and her motion to disqualify him from her case, and again cast the deciding vote against her, in another 3-to-2 decision that benefitted the justice personally, by enhancing his financial interest in the liquor industry?

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IN THE

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No. 96-

SHAWNA SNYDER,

Petitioner,

v.

JOSEPH VIANI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

Petitioner SHAWNA SNYDER respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nevada, which affirmed summary judgment against petitioner, denied her motion for rehearing, and denied her motion to disqualify a supreme court justice from sitting on her case, which she made after learning that the justice's personal financial interests had benefitted by his deciding vote against her, thereby violating petitioner's right to procedural Due Process of Law under the Fourteenth Amendment.

OPINIONS BELOW

The Nevada Supreme Court issued two opinions. The first is reported at *Snyder v. Viani*, 110 Nev. 1339, 885 P.2d 610 (1994). The second is reported at *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170 (1996). Both are reprinted in the Appendix. App. 1a, 17a. The trial court's order granting summary judgment against petitioner's wrongful death suit against the vendor of alcohol illegally sold to her under-age brother, which the Nevada Supreme Court affirmed, is unpublished.

Remittitur issued on May 13, 1996, ten days after the Nevada Supreme Court filed its second opinion.

JURISDICTION

The Nevada Supreme Court entered its original decision on November 30, 1994. App 1a. Petitioner filed a timely motion to disqualify Justice Rose, vacate the court's opinion, and for reargument on the merits of her appeal. Petitioner's motions were denied on May 3, 1996 by Justices Rose, Shearing and Young. App. 17a. Justices Steffen and Springer filed separate dissenting opinions. App. 38a. This petition has been filed within ninety days of that date. Jurisdiction exists under 28 U.S.C., sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On November 30, 1994, the Nevada Supreme Court issued an opinion affirming summary judgment against petitioner, SHAWNA SNYDER, summarily denying her wrongful death claim against a Nevada tavern owner who illegally sold her brother alcohol, allegedly resulting in her brother's death in a highway collision. The opinion not only adversely affected petitioner, it affected *all* claimants in Nevada who might assert "dramshop" liability against tavern owners who unlawfully sell alcohol to minors or intoxicated persons, followed by a highway collision. Conversely, it benefitted *all* tavern owners and liquor vendors in Nevada, by reducing their exposure to legal accountability for illegal sales of alcohol, and lowering their liability insurance rates. *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170 (1996), dissenting opinion, App. 17a.

One of those tavern owners and liquor licensees was Justice Rose himself. In casting the "swing vote" against petitioner, he benefitted his personal financial interests in his tavern.

The 3-to-2 opinion of the Nevada Supreme Court was signed by Justices Young, Shearing and Rose. *Snyder v. Viani*, 110 Nev. 1339, 885 P.2d 610 (1994). The remaining two justices, Steffen and Springer, filed a dissenting opinion, holding that petitioner's "dramshop liability" lawsuit stated a valid cause of action that ought to be decided by a jury.

On February 1, 1995, petitioner SHAWNA SNYDER filed a motion to disqualify Justice Rose pursuant to Nevada Rules of Appellate Procedure 35(a), asserting under oath that after the November 30, 1994 (first) decision of the Nevada Supreme Court, she had learned for the first time that Justice Rose himself owned a liquor license and a tavern. Petitioner moved for a rehearing of her appeal, and for disqualification of Justice Rose. She also requested that Justice Rose refrain from voting on the issue of his own disqualification, citing Nevada Revised Statutes 1.225(4), which provides that:

> Any party to an action or proceeding seeking to disqualify a justice of the supreme court for actual or implied bias shall file a charge in writing, specifying the facts upon which such disqualification is sought. Hearing on such charge shall be had before the *other* justices of the supreme court. (Emphasis supplied).

Petitioner's specification of the facts upon which she sought disqualification included the fact that Justice Rose owned, at all times relevant, one or more taverns in Nevada, that he was the owner of a liquor and gambling license, and that he had promised fellow tavern owners, through his agent, that he would protect them from dramshop liability, if re-elected to the Nevada Supreme Court. Petitioner further asserted that Justice Rose was disqualified because his vote, while adverse to her, benefitted Justice Rose's own financial interest in his tavern. Petitioner's motion also sought to vacate the first opinion, and requested a rehearing before non-disqualified judges, pursuant to Rule 40, Nevada Rules of Appellate Procedure.

On May 3, 1996, the Nevada Supreme Court issued its second opinion, authored by Justice Young, and concurred in by Justice Shearing and Rose. This decision denied

petitioner's motion to disqualify Justice Rose and to vacate the opinion. It also held that Justice Rose would be permitted to vote on the issue of his own disqualification from sitting on the rehearing case. *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170 (1996), App. 17a. In this second 3-to-2 opinion, the same majority of the Nevada Supreme Court concluded that petitioner, through "imputed knowledge" of her former counsel, had actual or constructive knowledge of Justice Rose's ownership of the tavern, and that this precluded petitioner from raising her claim of disqualification, under NRAP 35(a) because it was not asserted prior to the court's first opinion. The court also concluded that Justice Rose's ownership of a tavern did not create a pecuniary interest in petitioner's case sufficient to disqualify him from sitting, either on the first case, or on the second disqualification case.

BASIS CLAIMED FOR GRANTING WRIT

This case presents an important issue which was resolved by the Nevada Supreme Court in a way which is inconsistent with this Court's decisions and petitioner's basic right to Due Process. In this case, Justice Rose was under a duty to disclose several material facts to petitioner, prior to undertaking to sit as a judge on her appeal. Specifically, Justice Rose was obligated to disclose his ownership interest in a tavern or taverns, which interest was directly adverse to petitioner's legal position in the case. Furthermore, during Justice Rose's 1994 judicial re-election campaign, shortly before his November 30, 1994 swing vote in petitioner's case, he made promises through his employees and campaign staff that appeared to commit him to voting adversely to petitioner's position, and in favor of the liquor industry of which he was a part. *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170 (1996), dissenting opinion. App. 38a.

In any judicial proceeding, the most fundamental requirement of due process is an impartial tribunal. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). This Court has consistently recognized that due process requires the disqualification of a judicial officer in any situation where extreme personal biases or prejudices will affect the outcome of the decision. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1985).

In *Lavoie*, this Court held that a state supreme court justice had wrongfully participated in a case in which he had a disqualifying interest. The underlying action was an insurance bad faith case in which an Alabama jury awarded $3.5 million in punitive damages to the plaintiff. The judgment was affirmed in a 5-4 *per curiam* decision of the Supreme Court of Alabama, with the swing vote being cast by Alabama Supreme Court Justice Embry. While a motion for rehearing of the appeal was pending, the appellant learned that Justice Embry had filed two actions against other insurance companies in an Alabama court, alleging bad-faith failure to pay claims and seeking punitive damages.

In *Lavoie*, this Court addressed the question of what constitutes a disqualifying interest. In doing so, it reviewed some of its pivotal precedents. After briefly discussing *Tumey*, *supra*, this Court stated:

> More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with

> precision." *Ibid.* Nonetheless, a reasonable formulation of the issue is whether the "situation is one 'which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'" *Ward v. Village of Monroeville*, 409 U.S., at 60.

Lavoie, 475 U.S., at 822; *see also Exxon Corp. v. Heinze*, 32 F.3d 1399, 1403 (9th Cir. 1994).

While a "direct and substantial interest" (*Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) "cannot be defined with precision" (*In re Murchison*, 349 U.S. 133, 136 (1955)), it can be measured by determining whether, under all the facts and circumstances, there would be a "possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." *Ward*, 409 U.S., at 60; internal quotation marks omitted.

After reviewing all of the relevant circumstances, this Court determined that Justice Embry's interest in his own bad-faith cases disqualified him from participating in the *Lavoie* case. One of the factors considered by this Court was that the *Lavoie* case was a final pronouncement of Alabama's highest court and, therefore, the decision would have effect as legal precedent on cases in which Justice Embry had an interest. This Court noted that there was never any claim that Justice Embry had a *direct* interest in the case against Aetna Life Insurance Company. That fact notwithstanding, this Court concluded that the "appearance of justice" would best be served by vacating the decision and remanding for further proceedings.

Another instructive case is *State of California v. Kleppe*, 431 F.Supp. 1344 (C.D. Cal. 1977). As in *Lavoie*, the disqualified judge in *Kleppe* did not have an interest in any of

the parties directly before the court. The judge in *Kleppe* owned shares of stock in Union Oil Company. While Union Oil was not a party to the proceedings, its fortune could have been affected by the precedent setting effect of the decision. This, in turn, could have affected the value of the judge's ownership interest. Thus, both *Lavoie* and *Kleppe* support the proposition that a judge may have a disqualifying interest in a case, regardless of the fact that he has no direct interest in any of the parties before the court.

The circumstances surrounding Justice Rose's ownership of a tavern, particularly when viewed in light of his election campaign promises, presents a situation "'which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'" *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). As demonstrated in the dissenting opinion of Justices Steffen and Springer in the second decision, *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170, 178 (1996), App. 38a, during the time in which petitioner's appeal was under submission to the Nevada Supreme Court, Justice Rose stated his intention to protect his own private interests, as well as those of his fellow tavern owners, in any future dramshop litigation. Indeed, he solicited political campaign contributions, by asserting, in effect, that he would *not* "hold the balance nice, clear and true." *Id.* Local tavern owners circulated letters within the community stating an urgent message that all tavern owners had a direct and substantial financial interest in having Justice Rose participate in "dram shop" cases. The interest was characterized as being sufficiently direct that the very "livelihood" of Nevada tavern owners depended upon Justice Rose's votes in these cases. Because Justice Rose was, himself, a tavern owner, and a liquor and gambling licensee, there is an inappropriate connection between his ownership interest and his participation in the case which is inconsistent

with this Court's decisions. His interest in the tavern cannot be characterized as "so remote, trifling or insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual." *Tumey v. Ohio*, 273 U.S. 510, 531 (1927) (citation omitted).

And, as demonstrated in the dissenting opinion of Justice Steffen in the second opinion, the majority's decision should be vacated because Justice Rose participated in this opinion despite his clear interest in the case. *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170, 178 (1996). Justice Rose's participation in the second opinion, including his voting on the issue of his own disqualification, violated petitioner's Due Process right to a fair and impartial tribunal. Furthermore, his participation in the second opinion was a clear violation of Nevada Revised Statute 1.225(4), providing that:

> **Grounds and procedure for disqualifying supreme court justices.**
>
> . . . .
>
> 4. Any party to an action or proceeding seeking to disqualify a justice of the supreme court for actual or implied bias shall file a charge in writing, specifying the facts upon which such disqualification is sought. Hearing on such charge shall be had before the *other justices* of the supreme court. (Emphasis supplied) App. 17a.

Petitioner requested Justice Rose not to participate in the decision on the issue of his own disqualification. Justice Rose rejected this request, and participated in the (second) 3-to-2 opinion of the Court, presumably authored by Justice Young, with Justices Rose and Shearing concurring. Justice Rose also filed a specially concurring opinion. App. 33a.

In *Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.*, 508 U.S. 602 (1993), this Court reviewed some of its decisions concerning disqualifying interests and noted that "Justice," indeed, "must satisfy the appearance of justice." As Justice Scalia recently reminded us: "Wise observers have long understood that the appearance of justice is as important as its reality." *J.E.B. v. Alabama ex rel. T.B.*, ___ U.S. ___, ___ n. 3, 114 S.Ct. 1419, 1438 n. 3 (1994) Scalia, J., dissenting. Thus, the United States Congress has enacted 28 U.S.C. § 455(a), which provides that a judge is disqualified where his impartiality might reasonably be questioned. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

Similarly, Canon 3E of the Nevada Code of Judicial Conduct provides: "A judge shall perform the duties of a judicial office impartially and diligently." In pertinent part, the Canon also states: "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . .." Furthermore, a commentary to the Canon states that, "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." (App.186a)

The question of whether a judge's impartiality might reasonably be questioned calls for the application of an objective standard. In *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 499 U.S. 820 (1980), the court held that the test is whether an objective, disinterested lay observer, fully informed of the facts underlying the grounds upon which recusal was sought, would entertain a significant doubt about the judge's impartiality. See also *Tyson v. State*, 622 N.E.2d 457 (Ind. 1993), where

the Chief Justice of the Indiana Supreme Court recused himself in a highly publicized case, observing that the test is whether an objective person, informed of all the surrounding circumstances, would have a reasonable basis for doubting the judge's impartiality. In the present case, it is clear that any reasonable observer, informed of such facts and circumstances, would entertain a significant doubt about Justice Rose's impartiality in petitioner's case.

Canon 5 of the Nevada Code of Judicial Conduct states that, "[a] judge or judicial candidate shall refrain from inappropriate political activities." Justice Rose violated this Canon when, acting through his employee and with the express, prior authorization of his campaign staff, he committed himself to voting against dram shop liability and nearly any other legal result that may have an adverse affect on his fellow tavern owners. App. 188a.

Canon 4 of the Nevada Code of Judicial Conduct requires that, "[a] judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations." Justice Rose has violated this Canon by promising to continue to protect the interests of his fellow tavern owners by capitalizing on his own conflict of interest. His conduct may be perceived by an objective lay person as an exploitation of his judicial position. App. 187a. Canon 2 of the Nevada Code of Judicial Conduct states: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." App. 185a. Canon 1 states that, "[a] judge shall uphold the integrity and independence of the judiciary." App.184a.

Justice Rose's conduct has violated these judicial canons of ethics by compromising the integrity and independence of the Nevada Judiciary. More importantly, he has damaged public confidence in the judiciary's ability to be impartial.

CONCLUSION

Petitioner had a right to have her appeal in the Nevada Supreme Court heard by a panel of justices who had no financial interest in the outcome of her case. Nevada Supreme Court Justice Rose failed to disclose to petitioner the fact that the justice owned a tavern himself, and a financial interest in the outcome of petitioner's case. When Justice Rose cast the "swing vote" in petitioner's appeal, he was, in effect, acting as a judge in his own case. His conduct in doing so violated several Canons of the Nevada Code of Judicial Conduct. It is the type of behavior which would cause a reasonable person to question his impartiality. Justice Rose was given an opportunity to correct this violation, when petitioner requested his recusal from her case, and asked for a rehearing of her appeal. The justice's refusal to do so, and his voting upon the very issue of his own disqualification, violated Nevada statutory law, and constituted a second violation of petitioner's Fourteenth Amendment right of Due Process. This Court ought to issue a writ of certiorari, vacate the judgment of the Supreme Court of Nevada, and remand the case for further proceedings consistent with the principles of Due Process of Law. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 829 (1985).

Respectfully submitted,

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Supreme Court, U.S.
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v.

JOSEPH VIANI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWNA SNYDER, AS THE SPECIAL ADMINISTRATOR OF THE ESTATE OF DANIEL PATRICK LOVETT, DECEDENT,

Appellant,

vs.

JOSEPH VIANI, INDIVIDUALLY AND D/B/A JOE'S TAVERN; TOMMY JO MONTOYA; TAMMY ADAMS; MINERAL COUNTY SHERIFF'S OFFICE, A POLITICAL SUBDIVISION; JOHN MADRASO, JR., IN HIS OFFICIAL CAPACITY AS SHERIFF AND INDIVIDUALLY; JOHN LEONHARDT, IN HIS OFFICIAL CAPACITY AS SHERIFF AND INDIVIDUALLY,

Respondents.

No. 23726
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NOV 30 1994
Janette M. Bloom
Clerk of Supreme Court
By s/s **Janette M. Bloom**, Chief Deputy Clerk

Appeal from an order of the district court granting a motion to dismiss. Fifth Judicial District court, Mineral County; John P. Davis, Judge.

Affirmed.

Kenneth J. McKenna, Reno
for Appellant.

Erickson, Thorpe & Swainston;
Bradley & Drendel, Reno
for Respondents.

OPINION

By the Court, Young, J.:

FACTS

On July 12, 1990, Daniel Patrick Lovett was twenty years and nine months old. At about 11:45 that night, he visited Joe's Tavern in Hawthorne, Nevada, and was served alcoholic beverages. Lovett remained at Joe's Tavern until approximately 1:15 a.m. on the morning of July 13, 1990, when he went to the El Capitan Hotel/Casino. Lovett stayed at the El Capitan until approximately 6:00 a.m., at which time he got into his vehicle and began driving to Sacramento, California. At approximately 6:30 a.m., Lovett crossed over the center line of Highway 95 north of Schurz, Nevada, and collided head-on with a motorhome. The motorhome's four

occupants, along with Lovett, were killed. At the time of the accident, Lovett had a blood alcohol level of 0.187 percent.

On March 30, 1992, Shawna Snyder, the special administrator of Lovett's estate, brought an action for negligence, malice and breach of contract against respondents. In her complaint, Snyder alleged that even though employees at Joe's Tavern knew that Lovett was not yet twenty-one years old and that he planned to drive to Sacramento, they negligently and maliciously served him alcoholic beverages. In addition, Snyder asserted that the Sheriff's Department acted negligently and with malice in implementing a policy that required deputies not to ask for the identification of patrons at Joe's Tavern. Finally, Snyder alleged that various signs at Joe's Tavern, stating that alcoholic beverages would not be served to underage patrons, established a contract between Joe's Tavern and the public. According to Snyder, by serving Lovett alcoholic beverages, Joe's tavern breached its contractual duty to refuse to sell him such beverages. On August 27, 1992, pursuant to NRCP 12(b)(5), the district court entered an order granting respondents' motion to dismiss Snyder's action.

DISCUSSION

Snyder asserts that the district court erred in dismissing her action because it is distinguishable from prior Nevada cases. In particular, Snyder contends that her action involves the sale of alcohol to an underage drinker, not to an inebriated person, and injury to the drinker, not a third party. Snyder also argues that there is a direct nexus here between

the sale of alcohol and the death of Lovett, and that this case is not based on the violation of any criminal statutes.

In reviewing an order granting a motion to dismiss, this court must "determine whether or not the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief." Edgar v. Wagner, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985) (citations omitted). We conclude that Snyder's complaint failed to state a claim upon which relief could be granted and that the district court properly granted respondent' motion to dismiss.

The issue of tavern keeper liability for alcohol-related injuries was first addressed by this court in Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969). In Hamm, we adopted the common law rule that consuming alcoholic beverages, and not furnishing them, is the proximate cause of third party alcohol-related injuries. In addition, we determined that a tavern keeper's violation of a criminal statute prohibiting the sale of alcohol to inebriated persons does not constitute negligence per se. Further, we concluded that if civil liability were imposed on tavern keepers, such liability would have to be established by "legislative act after appropriate surveys, hearings and investigations [.]" Id. at 101, 450 P.2d at 359.

During the next thirteen years, we followed Hamm, to varying degrees, in five published opinions. See Yoscovitch v. Wasson, 98 Nev. 250, 645 P2d. 975 (1982) (concluding that proximate cause of injuries brought about by underage drunken driver was driver's consumption of alcohol, not vendor's sale of alcohol); Bell v. Alpha Tau Omega, 98 Nev.

109, 642 P.2d. 161 (1982) (ruling that violation of criminal statute prohibiting sale of alcoholic beverages to persons under the age of twenty-one does not constitute negligence per se); Van Cleave v. Kietz-Mill Minit Mart, 97 Nev. 474, 633 P.2d (1981) (holding that sale of alcoholic beverages to underage drinkers does not constitute "willful or wanton misconduct"); Davies v. Butler, 95 Nev. 763, 602 P.2d 605 (1979) (reiterating that violation of law prohibiting provision of liquor to inebriated persons does not constitute negligence per se and concluding that alcohol provider's willful or wanton misconduct may, in some situations, proximately cause alcohol-related injuries); Mills v. Continental Parking Corp., 86 Nev. 724, 475 P.2d 673 (1970) (ruling that parking lot operator who returned keys to inebriated driver was not liable for subsequent injuries to third party).

Most recently, in Hinegardner v. Marcor Resorts, 108 Nev. 1091, 844 P. 2d 800 (1992), we considered a situation similar to that presented here. In Hinegardner, an underage drinker, who had consumed alcoholic beverages at several drinking establishments, drove his car on a Nevada highway and collided with another vehicle, injuring its occupants. One of the injured third parties filed a complaint against the tavern keepers, alleging causes of action for negligence and negligence per se. The district court subsequently granted the tavern keepers' motion to dismiss. *Id. at 1092-93, 844 P.2d at 801.

On appeal, the injured party maintained that the "modern trend" is to allow third party claims of negligence and negligence per se against tavern keepers, and that this court was an appropriate forum for a change in the law. We

considered whether we should modify existing Nevada law to recognize third parties' claims for relief against tavern keepers who furnish alcoholic beverages to an underage drinker, but concluded that any "modern trend" was not significant enough to justify the abrogation of our long line of decisions denying negligence claims against tavern keepers. We also reiterated that the violation of a penal statute prohibiting the sale of alcohol to an underage person is not negligence per se and concluded that "only legislative mandate should create civil liability for vendors who serve alcohol to minors." Id. at 1095-96, 844 P.2d at 803.

Based upon our prior cases, and, in particular, our recent opinion in Hinegardner, we conclude that Snyder failed to set forth allegations sufficient to establish a viable claim against any of the respondents. With regard to Snyder's negligence claim against the tavern keeper, we have previously adopted the common law rule exempting tavern keepers from liability for alcohol-related injuries:

> At common law, courts refused to recognize a cause of action arising out of the sale or furnishing of intoxicating beverages.... [T]he common law considers the act of selling the intoxicating beverage as too remote to serve as the proximate cause of an injury resulting from the negligent conduct of the purchaser of the drink. Nevada subscribes to the common law rule.

Id. at 1093, 844 P.2d at 802.

Our continued adherence to the bright-line common law rule necessitates our conclusion that, as with injuries to third parties, consumption is the proximate cause of alcohol-related injuries to the drinker.

Furthermore, we have recognized that permitting third-party negligence claims against commercial alcohol vendors would require us "to answer. . . a sundry of . . multifarious questions for the flood of injured litigants that [would] inevitably crowd the Nevada courts." Id. at 1096, 844 P2d at 804. First-party claims, like third-party claims, would flood our courts with a multitude of questions that are better addressed by the legislature. "Where, as here, the issue involves many competing societal, economic, and policy considerations, the legislative procedures and safeguards are well equipped to the task of fashioning an appropriate change, if any, to the settled rule." 108 Nev. at 1096, 844 P.2d at 804. We find it noteworthy that following our decision in Hinegardner, the 1993 Nevada legislature chose not to enact legislation that would impose civil liability on tavern keepers for the sale of alcoholic beverages to underage drinkers. This choice not to extend liability supports our decision in Hinegardner and our decision here.

Snyder's remaining claims are also insufficient. With regard to her negligence claim against the Sheriff's Department and its officers, NRS 41.0336 provides that a law enforcement agency and its officers are not liable for negligent acts or omissions unless the victim detrimentally relied on the agency's or officers' representations or the officers affirmatively caused harm to the victim. Here,

Snyder has made no allegations that would bring her claim of negligence within the purview of NRS 41.0226.

Further, Snyder's allegations that respondents acted with "malice" do not set forth any right to relief. A plurality of this court has previously defined "malice," in the context of our punitive damages statute (NRS 42.010), as "hatred and ill-will and the deliberate intent to injure." Craigo v. Circus-Circus Enterprises, 106 Nev. 1, 9, 786 P.2d 22, 26 (1990). Here, Snyder has alleged no facts suggesting that any of the defendants acted with ill-will or a deliberate intent to injure Lovett.[1] Finally, as Snyder has not alleged facts necessary to establish contract formation between the tavern and Lovett, her breach of contract claim necessarily fails. We therefore affirm the district court's order granting respondents' motion to dismiss.

/s/ YOUNG, J.
Young

We concur:

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[1] Furthermore, we have held that knowingly furnishing or selling alcohol to an underage person, even if done more than once, does not constitute "willful or wanton misconduct." See Van Cleave, 97 Nev. at 416, 633 P.2d at 1221. Contrary to Snyder's assertion that her district court action is not based on the violation of any criminal statutes, Snyder's claim of "malice"is grounded, in part, on respondents' alleged "violati[on] [of] state statutes enacted to protect minors." We have previously held that the violation of a criminal statute regarding the sale of alcohol to a minor does not constitute negligence per se. See Hinegardner, 108 Nev. at 1096-96, 844 P.2d at 803; Bell v. Alpha Tau Omega, 98 Nev. 109, 642 P.2d 161 91982). Such violation, in and of itself, certainly does not suggest "malice."

/s/ ROSE, C.J.Rose

/s/ SHEARING, J. Shearing

DISSENTING OPINION

Steffen, J., with whom Springer, J. concurs, dissenting:

For reasons detailed in my dissent in Hinegardner v. Marcor Resorts, 108 Nev. 1091, 844 P.2d 800 (1992), I am compelled to dissent in the instant case.

Unfortunately, the facts of this case are even more egregious and tragic than those in Hinegardner. Here, the intoxicated driver, Daniel Patrick Lovett, only twenty years of age, was drinking alcoholic beverages from about 11:45 p.m. until approximately 1:15 a.m. while at Joe's Tavern in Hawthorne, Nevada. Allegedly, the tavern employees knew that Lovett was under the lawful age for consuming alcoholic beverages and that he planned to drive to Sacramento, California. After leaving Joe's Tavern, Lovett went to the El Capitan Hotel/Casino where he stayed until his departure for Sacramento at 6:00 a.m. The intoxicated youth had no way of knowing that he had only one-half hour of life left and that in the process of killing himself he would also be an instrument of doom for four innocent people who were moving rapidly toward a rendezvous with a lethal combination of steel and alcohol.

Lovett's death machine crossed over the center line of Highway 95 north of Schurz, Nevada, and crashed head-on

with a motorhome carrying four occupants. Lovett and his victims were all killed at approximately 6:30 a.m. on the morning after Lovett's night of drinking. Tests demonstrated that Lovett had a blood alcohol level of 0.187 percent at the time of the collision.

Once again, the majority placed great emphasis on economic concerns than on human life. The rationale for the majority's position is the old bromide that under the common law, it is the consumption of alcoholic beverages rather than the furnishing of such beverages that is the proximate cause of third party alcohol-related injuries. In Hindegardner it was noted:

> It is instructive to note the development of the common law in its response to the growing menage of inebriated drivers on the highways. Justice Erickson, writing for the Supreme Court of Colorado in Largo Corp. v. Crespin, 727 P. 2d 1098 (Colo. 1986), recounted:
> The modern era of dramshop liability began in 1959, when two courts--the Seventh Circuit in Waynick v. Chicago's Last Department Store, 269 F. 2d 322 (7th Cir. 1959), cert. denied, 362 U.S. 903, 80 S.Ct. 611, 4 L.Ed.2d 554 (1960), and the New Jersey Supreme Court in Rappaport vs. Nichols, 31 N.J. 188, 156 A.2d 1 (1959)--held that a third party injured by an intoxicated person may bring a negligence action against the commercial vendor who sold liquor to the intoxicated person. Both decisions rejected the defendant's contention

that the sale or service of an alcoholic beverage could not, as a matter of law, be the proximate cause of injury to a third party. The Rappaport court said: "Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or to a person he knows or should know from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person or the minor." 156 A.2d at 8. The court concluded that the danger was "particularly evident in current times when traveling by car to and from the tavern is no commonplace and accidents resulting from drinking are so frequent." Id.

The Largo court recognized the clear foreseeability of injury resulting from drivers whose abilities and judgment are impaired by intoxicants. moreover, the court described as "outdated and ill reasoned," the old common law rule that "the person who consumed alcohol became a superseding cause of the injury and broke the causal relation between the vendor's conduct and the plaintiff's injuries." Id. at 1103.

Hingardner v. Marcor Resort, 108 Nev. 1091, 1098, 844 P.2d 800, 805 (1992) (Steffen, J., dissenting).

As previously observed in Hinegarder, the majority's position would place them in solid dissent with the landmark ruling of MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), on grounds that liability in the manufacture and sale of products, including automobiles, would be limited to those comparatively few instances where there was contractual privity between the manufacturer and the purchaser of the product. See id. at 1097, 844 P.2d at 804 (Steffen, J., dissenting). Thus the interpositioning of the retailer between the manufacturer and the consumer who would ultimately use and be injured by the defective product, would generally leave the consumer without a remedy for his or her injuries. See MacPherson, 111 N.E. at 1053-54. Likewise, in negligent entrustment cases, the majority's reasoning would eliminate the cause of action on grounds that it is the action of the party to whom the instrumentality of harm is negligently intrusted who causes the harm rather than the one who negligently entrusts the instrumentality to someone unsuited to the trust.

> As I observed in dissent in Hinegardner, [t]he role of alcohol in the death and maiming of countless numbers of men, women and children each year is well and indisputably attested. The shattered concourses of victims of alcohol-related accidents have combined with a restive and angry society to create a responsive, solid majority of courts that have recognized a cause of action against negligent vendors or alcohol.

108 Nev. at 1097, 844 P.2d at 805.

Since the majority once again spurns that opportunity to join "the overwhelming majority of courts [that] have abandoned the old common-law rule and allowed negligence actions against commercial vendors of alcoholic beverages" (Largo, 727 P.2d at 1101) by ceding the task to the Legislature, I must again register my protest in the strongest of terms.

Given the fact that Nevada has a singularly strong financial dependence upon segments of the state economy that dispense alcohol as a significant inducement to other forms of business activity, it is both unrealistic and irresponsible to espouse the fantasy that the Legislative branch of government will effectively consider and adopt dramshop legislation. Although we can hardly fault our legislators for shunning such an act of self-immolation, there is no excuse for the "non-political" judicial branch of government doing the same. I realize the unfortunate fact that judges, including the members of this court, are elected in this state, but that constitutes no valid excuse for this court's failing to respond to the clear and increasing demands of our society to give relief to the growing number of victims who fall prey to inebriated drivers on our highways. Despite the apparent need to substantially finance judicial elections with contributions from segments of our state economy that are purveyors of alcoholic beverage[illegible] "biting the hand that feeds you" should never be a consideration in the judicial process.

The "overwhelming majority of courts" have advanced the common law to meet the conditions of our present society because it should be clear to all that if vendors of alcoholic

beverages are factored into the liability equation, there will be fewer intoxicated drivers, like Lovett, to continue the highway carnage that truly has become such a national disgrace and tragedy. Fewer intoxicated drivers translates into fewer victims. Depreciating inebriated drivers results in the veneration of human life. Placing greater value on human life than economic advantage, lifts society to a higher plane. Conversely, emphasizing commercial advantage over human life and suffering degrades society and lowers the quality of its civilization.

The majority would have us believe that there are so many problems and nuances of problems involved in placing negligent vendors of alcohol in the liability equation, that these problems and the difficulties inherent in their resolution outweigh the substantial attenuation of human misery and death that would result from the implementation of solutions. I suggest that the majority's fears are as unjustified as its priorities.

Quoting again from my dissent in Hinegardner, consider the vision and pervasive impact of the venerable Judge Cardozo who, writing for the MacPherson court, said:

> Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.
>
> . . . .

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made [such as an intoxicated human ready to operate a high speed vehicle], it is then a thing of danger. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."

Hinegardner, 108 Nev. at 1097, 844 P.2d 804-05 (quoting McPherson, 111 N.E. at 1053). Moreover, concerning the problems that are of such paramount concern to the majority, I refer again to my dissent in Hinegardner where, quoting from the Colorado Supreme Court in Largo, that court instructed:

> "[A]s to the consequences of imposing such a burden upon tavern owners, we reject Largo's claim that civil liability for the negligent sale of alcohol would impose insurmountable proof problems on tavern owners. Whatever problems of proof exist, the plaintiff will be confronted with the same obstacles in reconstructing the facts, and the plaintiff, not the defendant, will bear the burden of proving a breach of duty."

Hinegardner, 108 Nev. at 1099, 844 P.2d at 806 (quoting Largo, 727 P.2d at 1103).

As reflected by the positive response of an overwhelming majority of the common law courts of this nation, there is a compelling need for the judiciary of this state to provide its citizens and the users of its highways with relief from the growing menace of intoxicated drivers. We can realistically look to no other source. This court must recognize the fact that irresponsible and negligent vendors of alcoholic beverages are priming people for roles as drunken drivers who kill and maim the innocent travelers on Nevada's highways. Entire families are wiped out and destroyed by this menace. This court will have only so many opportunities to address the issues raised in the instant case. Each time we fail to act, we assure the proliferation of needless human death and suffering. Since, in my humble opinion, we have far too long perpetuated a condition that cries out for principled remedies, partial though they may be, I am again forced to dissent from the majority's most unfortunate act of judicial forfeiture.

s/s STEFFEN, J.
Steffen

I concur:
s/s SPRINGER, J.

ATTEST: A FULL, TRUE AND
CORRECT COPY.

Clerk of the Supreme Court

By /s/ L. Castillo, Deputy Clerk

IN THE SUPREME COURT IN THE STATE OF NEVADA

SHAWNA SNYDER, AS THE SPECIAL ADMINISTRATOR OF THE ESTATE OF DANIEL PATRICK LOVETT, DECEDENT,

Appellant,

vs.

JOSEPH VIANI, INDIVIDUALLY AND D/B/A JOE'S TAVERN; TOMMY JO MONTOYA; TAMMY ADAMS; MINERAL COUNTY SHERIFF'S OFFICE, A POLITICAL SUBDIVISION; JOHN MADRASO, JR., IN HIS OFFICIAL CAPACITY AS SHERIFF AND INDIVIDUALLY; JOHN LEONHARDT, IN HIS OFFICIAL CAPACITY AS SHERIFF AND INDIVIDUALLY,

Respondents

No. 23726

FILED
May 03 1996
Janette M. Bloom
Clerk of Supreme Court
By s/s J. Richard, CHIEF DEPUTY CLERK

Appeal from an order of the district court granting a motion to dismiss. Fifth Judicial District Court, Mineral County; John P. Davis, Judge.

Motion to disqualify Justice Robert Rose denied; motion to vacate opinion denied; petition for rehearing denied.

Peter Chase Neumann, Reno,
for Appellant.

Erickson, Thorpe & Swainston, Reno; Bradley, Drendel & Jeanney, Reno,
for Respondents.

OPINION

By the Court, Young, J.:

The Nevada Supreme Court issued its opinion in this case on November 30, 1994, upholding our prior decisions that have refused to impose liability upon servers of alcoholic beverages for damage caused by patrons who subsequently use our highways absent legislation establishing such liability. Justice Rose was part of the three-Justice majority; Chief Justice Steffen and Justice Springer dissented.

On February 1, 1995, Shawna Snyder's new counsel filed a motion to disqualify Justice Rose pursuant to NRAP 35(a) on the ground that Justice Rose should not have

participated in the decision because he owned a restaurant/bar in Clark County, Nevada, and this created a conflict of interest with the issue decided. Snyder's motion also seeks vacation of the issued opinion and a rehearing before "non-disqualified judges, pursuant to NRAP 40.

When a justice has participated in a case, NRAP 35 requires that a motion to disqualify must establish that it is timely filed and that the alleged disqualifying interest amounts to "fraud or like illegal conduct." Snyder and her attorney had actual and constructive knowledge of Judge Rose's restaurant/bar ownership well prior to our decision in November, 1994 and Snyder waived any disqualification claim by not asserting it sooner. Further, Snyder's allegations, even if true, do not amount to "fraud or like illegal conduct" and therefore the grounds for her motion to disqualify are insufficient as a matter of law.

We also conclude that Justice Rose's ownership did not create a direct, ongoing pecuniary interest such that would disqualify him from participation in this case. Accordingly, we deny Snyder's motion to disqualify Justice Rose and her petition for rehearing.

Discussion

The threshold issue is whether Snyder had, as a matter of law, actual or constructive notice of Justice Rose's ownership of a restaurant/bar in Las Vegas prior to our decision in this case and is thereby precluded from now asserting this motion pursuant to NRAP 35. We answer this question in the affirmative.

Actual notice of interest

In addition to the substantial information that clearly gave constructive notice to the public at large about Justice Rose's restaurant/bar ownership, the record establishes that Snyder's attorney had actual notice of Rose's interest. In June 1994, Snyder's former attorney in the appeal of this case had a conversation with Clark Santini about this very case and Rose's ownership of a bar. Santini, an experienced investigator by profession, had a detailed recollection of that conversation.[1]

While Snyder's former attorney initially denied having any knowledge of Rose's restaurant/bar interest prior to the decision, he did not respond to Santini's allegations when given the opportunity, and Snyder argued only that notice to her former attorney is insufficient to bind her.

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[1]In Santini's affidavit, he stated:

> The second was a case involving a minor who was served liquor at Joe Viani's bar and then killed himself and others in an automobile accident thereafter. McKenna indicated he had lost the case in district court but had appealed it to the Nevada Supreme Court. He indicated that he was uncertain about the Supreme Court result and elaborated. McKenna stated that he knew Justice Steffen was a Mormon and always voted against the bars in these types of cases, but McKenna said he did not know how he would fare with Justice Rose because he knew Justice Rose owned a bar in Las Vegas. However, he gave me the impression that he did not necessarily think Justice Rose would be biased. It was unmistakable that Ken McKenna knew in June, 1994, that Justice Rose owned a bar in Las Vegas.

Snyder's claiming that her attorney's knowledge does not bind her is directly contrary to our holding in the Ainsworth case and in numerous additional cases we have decided in the past decade. See, e.g., Stoecklein v. Johnson Electric, Inc., 109 Nev. 268, 273, 849 P.2d 305, 309 (1993); Arteaga v. Ibarra, 109 Nev. 772, 776-77, 858 P.2d 387, 390 (1993).

Therefore, Snyder's former attorney's actual knowledge of Rose's restaurant/bar ownership is imputed to Snyder. Since Snyder did not take any action to object to Roses's sitting on this case on the basis of his restaurant/bar ownership, those grounds for disqualification have been waived.

Constructive notice of interest

This court has established that if a party or his/her attorney has constructive notice of a judge's interest or relationship before a case is decided and does not object, that conflict or relationship will be waived. Ainsworth v. Combined Ins. Co., 105 Nev. 237, 774 P.2d 1003 (1989). In that case, numerous conflicts or relationships of a former justice who authored an opinion were cited as grounds for a rehearing of the case, and this court stated what was sufficient, as a matter of law, to put the insurance company, Combined, and its attorneys on notice of an interest or relationship.

Combined alleged that the counsel for the winning party, Ainsworth, has assisted the former justice in a prior campaign and was also a close personal friend. After

observing that allegations of bias in favor of or against an attorney for a litigant generally are not sufficient for disqualification of a judge, this court observed that Ainsworth's attorney's relationship with the campaign conducted years previous was "fully disclosed in numerous public, political advertisements and was well-known among members of the state bar long before this appeal was ever perfected." Id. at 261, 774 P.2d at 1020. The court determined that Combined knew or should have known of this political relationship and stated:

> Well-reasoned authority supports a conclusion, however, that counsel, knowing facts assertively supportive of a motion for reconsideration, recusal or vacatur based upon charges of bias and impropriety, "may not lie in wait" and raise those allegations in a motion "only after learning the court's ruling on the merits."Id. at 260, 774 P.2d at 1019 (quoting Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987).

Combined Insurance also claimed that the former justice had a close association with the Nevada Trial Lawyers Association (NTLA) and had been given an award by it the previous year, this being grounds for disqualification because NTLA had filed an amicus brief in the case and Ainsworth's attorney was prominent in the organization. However, this court concluded that some of the attorneys representing Combined were members of NTLA and presumably had knowledge of the award at the time it was conferred. The

court also referred to several newspaper articles about the former justice's award and concluded that Combined's counsel "knew or had reason to know of the award prior to the issuance of this court's decision," and that "Combined's failure to tender a prompt objection constitutes a waiver of its right to raise the issue at this later date." Ainsworth, 105 Nev. at 263-64 n.17, 774 P.2d at 1022 n.17.

Combined also claimed that the former justice had an interest in a business venture with Ainsworth's counsel. However, the court stated that: "[I]t is clear from the record that such a relationship was revealed in a public notice published in Reno's largest newspaper of general circulation on four separate occasions." Id. at 270 n.22, 774 P.2d at 1026 n.22. After a review of all the evidence sufficient to provide actual or constructive knowledge of the interests or relationships of the former justice prior to the decision, this court concluded that the former justice did not have "any direct, ongoing pecuniary interest in the outcome of any litigation before this court," that the factual allegations supporting a rehearing were known or should have been known to Combined's counsel well before the decision, and that no rehearing was warranted because it was not established that the former Justice "had any direct disqualifying interest in this litigation or that his impartiality toward the litigants might reasonably be questioned." Id. at 269, 270, 774, P.2d at 1026.

In numerous instances of claimed conflicts of interest, we held in Ainsworth that newspaper articles, legal notices, or common knowledge provided actual or constructive knowledge to the litigant's attorney and precluded a challenge

on those grounds after the issuance of the court's opinion. The information available to Snyder and her attorney of Rose's restaurant/bar ownership prior to the decision in this case was far more extensive than any such information cited in the Ainsworth case. Specifically, there was abundant evidence of Rose's restaurant/bar ownership presented throughout Nevada in the years prior to our decision, specifically including the following:

1. More than a decade of application filings and hearing notices made by the Nevada Gaming Control Board and Commission concerning Justice Rose's ownership of a restaurant/bar with fifteen slot machines in Las Vegas, Nevada.

2. A decade of applications, filings, and hearing notices before the Liquor and Gaming Control Board in Clark County, Las Vegas, and Henderson, Nevada, concerning Justice Rose's ownership of a restaurant/bar and fifteen slot machines.

3. The listings of the business entity that owned the restaurant/bar in Justice Rose's annual judicial disclosure reports for the years he has been a justice, most of the notices specifically describing the business as a restaurant/bar.

4. Numerous newspaper articles about Justice Rose's ownership of a restaurant/bar that appeared when the yearly disclosure reports were filed and when there was any activity taken by the Nevada Gaming Control Board or Commission concerning Justice Rose's ownership.

5. The enormous publicity given Justice Rose's restaurant/bar ownership during the 1994 election. This included an entire month of television and radio commercials about his ownership. One radio commercial stated that Justice Rose "moonlights as a poolroom and tavern owner" and another made a very similar assertion. A television ad that ran extensively before the November 8, 1994 election stated that "Rose operates a bar and pool hall in Las Vegas" and at the same time showed film of the tavern. Literally hundreds of radio and television commercials were broadcast throughout Nevada about Justice Rose's interest just a month prior to the decision in this case.

NRAP 35

After the Ainsworth decision, this court adopted NRAP 35 to set forth the requirements a party must meet when attempting to disqualify a justice. A portion of the rule addressed the situation presented in the Ainsworth case.

In no event will the supreme court deem timely any motion or charge seeking the disqualification or recusal of a justice who has heard argument upon, or otherwise considered, any contested matter in the cause, except as to grounds based on fraud or like illegal conduct of which the challenging party had no notice until after the contested matter was considered.

NRAP 35(a).

The case of PETA v. Berosini, Ltd. 111 Nev. 431, 894 P.2d 33 (1995), was the first one to consider Rule 35

when a justice's disqualification was sought after an opinion had been rendered. In Peta, a limited exception was made to the requirement that a claim for disqualification is untimely after the opinion has been issued unless "fraud or like illegal conduct" is shown. The court determined that, in the interest of justice, PETA should not be precluded if there was no way that it could have known of the interest or association the judge had prior to the decision. Id. at 433 n.2, 894 P.2d at 338 n.2.

We feel this is an appropriate exception to the strict preclusion set forth in Rule 35, but it has no application in this case. We have set forth the facts that gave Snyder both actual and constructive knowledge of Justice Rose's interest, and a further exemption to Rule 35 is not warranted. Additionally, we would recommend that future exception to Rule 35 should be done by amendments to the rule rather than by court decision.

No direct, ongoing interest

The facts concerning Justice Rose's ownership of a restaurant/bar are not in dispute. He has had this interest prior to becoming a judge, and such ownership has been common knowledge in Nevada. In fact, Justice Rose participated in the case of Hinegardner v. Marcor Resorts, 108 Nev. 1091, 844 P.2d 800 (1992), that this court decided three years ago which presented the same issue as did this case, and no complaint about Rose's participation was made.

It is obvious that Justice Rose had no interest in Joe Viani's tavern, and no lawsuits were pending that claimed

liability against Rose on the theory espoused by Snyder. In Goldman v. Bryan, 104 Nev. 644, 651, 764 P.2d 1296, 1300 (1988), we cited State v. Scarborough, 410 P.2d 732, 734 (N.M. 1966), with approval for the proposition that a judge's "disqualifying 'interest' must be a present interest in the outcome of the proceeding, 'not some indirect, remote, speculative, theoretical or possible interest.'" It is true that Rose owned a restaurant/bar similar to that owned by Viani, but it has been held many times that a judge with an interest similar to that in litigation is not disqualified thereby. This principle was clearly stated in City of Valdosta v. Singleton, 28 S.E. 2d 759, 763 (Ga. 1944), in which the Georgia Supreme Court stated:

> [A] judge is not disqualified merely because of an interest in some abstract legal question that is presently involved and which may arise in some future litigation affecting him or his property rights ....

See also State v. Churchwell, 195 So. 2d 599, 600-01 (Fla. Dist. Ct. App. 1967). If this case had been decided in Snyder's favor, the decision would have been no economic impact on Justice Rose.

Further, Justice Rose's interest is not ongoing--he entered into a written contract to sell the restaurant/bar in July 1994, fourth months prior to the decision in this case. At the time the opinion was issued, the sale was in escrow awaiting only the final approval of the Nevada Gaming Control Board and Commission. Approval was given, and the sale was finalized in early 1995.

Justice Rose has stated that he has no feelings of bias toward or against any party in this litigation and that he believes he has an can be impartial to all concerned. This court has previously held that a judge's opinion as to his or her impartiality should be given substantial deference. In re Petition to Recall Dunleavy, 104 Nev. 784, 769 P.2d 1271 (1988). Given this deference and considering the undisputed facts and legal authority above-cited, we conclude that Justice Rose's ownership, as a matter of law, does not create a direct, ongoing pecuniary interest that would disqualify him from participation in this case or be a violation of the Nevada Code of Judicial Conduct.

Since Snyder's allegations present no legally cognizable grounds whatsoever supporting a reasonable inference of bias or impropriety, summary dismissal of her motion is warranted as a matter of law without any formal hearing. Ainsworth v. Combined Ins. Co., 105 Nev. 237, 270, 774 P.2d 1003, 1026 (1989); Dunleavy, 104 Nev. at 789, 769 P.2d at 1274. This rule of law was recently reaffirmed in Whitehead v. Comm'n on Jud. Discipline, 110 Nev. 380, 873 P.2d 946 (1994). In that case, Justices Steffen and Springer joined in determining that a motion to disqualify them was untimely, without merit, and insufficient as a matter of law to warrant a formal hearing under NRS 1.225(4). Id. at 422-29, 873 P.2d at 972-77.

> Finally, the Commission contended that this court improperly refused to conduct a hearing on the motion for disqualification. See NRS 1.225(4) (hearing on a motion or charge for disqualification shall be had before the

other justices of the supreme court). Not every motion for disqualification, however, rises to the level of a statutory "charge," which automatically calls for a formal hearing before unchallenged justices. For example, in the case of In re Petition to Recall Dunleavy, 104 Nev. 784, 789, 769 P.2d 1271,1274 (1988), this court explained:

> [T]he statutory provisions and mechanisms providing for a judge's disqualification are not activated, and summary dismissal of the challenge is appropriate, where the challenge fails to allege legally cognizable grounds supporting a reasonable inference of bias or prejudice.

Similarly, In Ainsworth, 105 Nev. at 270-271, 774 P.2d at 1026, this court explained that because factual allegations raised in support of a motion to disqualify "present[ed] no legally competent grounds supporting a reasonable inference of bias ... the hearing before unchallenged justices that is provided under NRS 1.225(4) [was] inapplicable." Therefore, in view of the legal insufficiency of the Commission's motion for disqualification, the Commission was not entitled to a hearing under NRS 1.225(4).

Id. at 428-29, 873 P.2d at 976-77.

Petitioner's other contentions

Snyder claims that this case presents a gaming issue and thus Justice Rose is precluded from participating in this case because of gaming Regulation No. 12. Regulation 12 requires any judge or justice holding a gaming license to refrain from participating in gaming-related matters. The record is uncontroverted that a gaming issue for a judge or justice has been narrowly construed and is one that involves the Gaming Control Board or Commission, its members or employees, or the enforcement or interpretation of Nevada gaming statutes.

The case before us does not involve any of these individuals or statutes. It is a case involving a fatal accident caused by a drunk driver whose estate Snyder now administers and a suit against a tavern asserting that it is responsible for the underaged drunk driver's death because it served him alcoholic beverages six hours before the accident. This is a case involving a fatal accident and the service of alcohol to a minor. It has nothing to do with gaming or the enforcement or interpretation of Nevada's gaming statutes. Accordingly, we reject Snyder's claim that Justice Rose should not participate in this case because it involves a gaming matter.

Snyder claims that a letter sent at the close of the 1994 election campaign by four tavern owners or operators, one of whom worked for the bar owned by Justice Rose, to other tavern owners seeking their support for Rose's re-election was improper. We disagree. The letter was on stationery that contained the logo of the four taverns and was

signed by each tavern owner or operator. It was not a letter or brochure that came from the Rose campaign for re-election or on its stationery.

The tavern owners wrote the letter in response to numerous attacks by Rose's election opponent based on Rose's bar ownership. The letter made two basic points. First, that Justice Rose was a good justice who made sound decisions and was attempting to reform the Nevada court system. Second, that he understood Nevada and its gaming/liquor industry since he had held a liquor/gaming license for more than a decade. An appendix was attached to the letter summarizing three cases decided by the Nevada Supreme Court in which Rose participated. One case concerned this court's established legal position that dram shop liability should be addressed by the Legislature and not enacted by an activist court. In that summary, it stated that Rose believed in "strong but fair DUI enforcement."

This letter was sent out by individuals who were not part of Justice Rose's campaign for re-election and did not represent that they were speaking for the justice. It was an interest group supporting a candidate and stating the reason for such support. The fact that a campaign manager approved the letter for its general content did not make it part of Justice Rose's campaign. Further, a candidate for judicial office has always been permitted to state his or her background, legal record, and commitment to upholding the law. Cf. Nevada Code of Judicial Conduct sections 5A(3)(d)(i), 5A(3)(e), and 5C(2). Although not called upon to decide this issue because the statements were made by an independent group and not by Justice Rose, it would appear

that any judge or justice should be permitted to state what he or she has done to improve the court system and the decisions he or she has made that are part of the record. We conclude that Snyder's other claims are also without merit.

CONCLUSION

Snyder, through knowledge imputed to her by what her former counsel knew, had actual knowledge of Justice Rose's ownership of a restaurant/bar and also constructive notice of that interest. Pursuant to NRAP 35(a), Snyder is precluded from raising this claim because it was not asserted prior to this court's opinion.

The undisputed facts also show that the Justice's ownership did not create a direct pecuniary interest in this case and such ownership was in the final stages of being sold. Accordingly, the motion to disqualify and the petition for rehearing are denied, along with all other requests for relief asserted by Snyder.

/s/ Young, J.
Young

We concur:

s/s Shearing, J.
Shearing
s/s Rose, J.
Rose

ROSE, J., concurring:

I concur to address the dissent, which is both hypocritical and misleading.

The fact that I owned a bar-restaurant in Las Vegas has been public knowledge since I joined this court seven years ago. The business has been listed in my yearly disclosure statement filed at the court, and I have talked many times with Justice Steffen and Springer about the bar and my attempts to sell it. When I voted at conference on this case and on Hinegardner v. Marcor Resorts, 198 Nev. 1091, 844 P.2d 800 (1992), neither Justice Steffen or Justice Springer made a whimper of any concern--as a judge is required to do if he or she observes what he or she believes is improper conduct by a fellow judge. See Nevada Code of Judicial Conduct, section 3D(1). If there was an authentic objection, it should have been voiced at that time.

Justices Steffen and Springer also express concern with my participation in this motion to disqualify, but they did the very same thing in the Whitehead case in which they were extremely interested. Whitehead v. Comm'n on Jud. Discipline. 110 Nev. 380, 422-29, 873 P.2d 946, 972-77 (1994) (Whitehead II). The Attorney General filed a motion to disqualify personal and financial interest because of a letter written by the justices' attorney to the Las Vegas Review-Journal. As the majority explains, Justice Steffen and Springer participated in the dismissal of the motion to disqualify lodged against them, stating that not every motion for disqualification "rises to the level of a statutory 'charge,'

which automatically calls for a formal hearing before unchallenged justices." Id. at 429, 873 P.2d at 976.

This case presents the same situation as in Whitehead II, but this time the motion is filed against me, and Justices Steffen and Springer now want to change the rules. What is good for the goose should be good for the gander.

In the dissents, Chief Justice Steffen and Justice Springer claim that they did not vote on their own disqualification, but one need only review pages 422-30 of the Whitehead II decision to see that Justice Steffen and Springer clearly considered the motion to disqualify them, determined that they could participate and then denied the challenge. Id. at 422-30, 873 P.2d at 972-77. The concurrence signature of Justices Steffen and Springer appear on page 430. The Justices' statements that they did not vote on their own disqualification is a reflection of the accuracy of many of the statements in their dissents.

When a judge is charged with a disqualifying interest, it must be established that the interest is a direct substantial ongoing financial or personal interest, and Snyder has totally failed to do that. A decision adverse to Viani's tavern would not have affected me personally or financially. At the time of the decision, my business had been sold, and the transfer was awaiting gaming board and commission approval. It was also subject to the control of the United States Bankruptcy Court. When I voted in the Viani case, there was no direct ongoing interest for me with my bar business. The dissent seems to acknowledge this, but states that it is possible that I will retake the bar business if not paid the remaining sales

price. This is rank speculation, and if this remote eventuality occurred, I would simply resell the property.

Not being able to establish a disqualifying ongoing direct interest when the Viani case was decided, the dissent refers back to the 1992 Hinegardner decision and claims I improperly voted on that case. That vote is not the subject of the motion to disqualify, and the dissent's criticism also lessened my insurance costs. I have always carried full high limits insurance coverage, including a one million dollar personal liability insurance umbrella. My insurance costs would have remained the same with or without a Dram Shop Act. However, this may not be true for other taverns or casinos.

The letter written by my bar manager and three of his bar manager/owner friends was an action taken independent of my campaign for reelection. I wrote no part of the letter, did not approve it in advance, and only gave three case citations which that constituency might have approved. I have always thought that a judge could refer to his record in a campaign and that he was not responsible for the statements and actions of third parties. The dissent states that this letter was "on behalf of the campaign," and that is simply false. It also claims that I fulfilled a campaign promise made in this letter in voting on the underlying case, but any promise made in the letter by the bar owners/managers was not a promise made by me, and I certainly did not feel bound by the letter.

I participate in the motion to disqualify me because, as a matter of law, the motion was not timely filed and does not establish "fraud or like illegal conduct" on my part, as is

required by NRAP 35. Even before the stringent requirements of NRAP 35 had been promulgated, Justices Steffen and Springer decided that a motion to disqualify former Justice Elmer Gunderson was not timely filed because prior to the court decision information had been in the newspapers about Gunderson's asserted disqualifying interests. Ainsworth v. Combined Ins. Co.,105 Nev. 237, 774 P.2d 1003 (1989). They also decided that although Gunderson's own attorney, Laura FitzSimmons, was an attorney in the Ainsworth case, this was not a sufficient outside interest to merit disqualification of Gunderson. When you combine the Ainsworth decision with the Gunderson. When you combine the Ainsworth decision with the Whitehead II decision, where Justices Springer and Steffen participated in dismissing the disqualification motion filed against them, and with NRAP 35, it is clear that, as a matter of law, the motion to disqualify me is not timely and is legally insufficient. I am using the same rules and reasoning Justices Steffen and Springer used to reject disqualification attempts filed against them and former Justice Elmer Gunderson.

As a final point, it certainly appears that the dissent is motivated more by continuing animosity towards me rather than any reasonable belief that Snyder has any chance of taking her case to trial for the estate of a drunk driver who killed four people. For decades the law in Nevada has been that no such action lies because this court will not judicially enact a Dram Shop law. In 1995, the Legislature passed a law stating unequivocally that such actions will not lie against a purveyor of alcoholic beverages. NRS 41.1305. Since the law of this state is very clear that an action such as

Snyder asserts will not be entertained by the courts, I can only think that the dissents' motivation is again to criticize and embarrass me.

s/s ROSE
Rose

Steffen, C.J., joined by Springer, J., dissenting:

Respectfully, I dissent from the majority's conclusion that Justice Rose is qualified to sit on this case, and for that reason would vacate the court's opinion and grant rehearing with another judge sitting in the place of Justice Rose.

Canon 2 of the Nevada Code of Judicial Conduct states that **"[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."** In the Commentary to Canon 2, it notes that "[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges....The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

In order to demonstrate why I strongly believe Justice Rose is disqualified to sit on the instant case, I attach hereto as Exhibit A, a letter dated October 26, 1994, (hereafter "the letter") which was signed by our colleague's bar manager, Steve McLaughin, on behalf of Justice Rose's reelection campaign. Justice Rose was aware of the letter and even provided the case citations that it referenced. The letter, which notes that Justice Rose was one of the majority of three (thus the swing vote) in the case of Hinegardner v. Marcor Resorts, 108 Nev. 1091, 844 P.2d 800 (1992) (Hinegardner involved basically the same issue concerning the liability of negligent vendors of alcoholic beverages as the instant case), ends with the following portent, which Justice Rose fulfills by voting on the instant case: "Bob's

election is a good bet--for you [the bars and commercial alcohol vendors of the state] and the State of Nevada. This is an important issue to each of our livelihoods."

The letter, which was signed by representatives of four commercial purveyors of alcoholic beverages, including Justice Rose's Sidelines Lounge and Restaurant, was directed to owners of similar establishments in an effort to secure campaign contributions for Justice Rose's reelection to this court. In referring to the Hinegardner case, the letter notes that:

> [T]he Nevada Supreme Court upheld the Nevada dram shop protection for bars and casinos by a 3-2 vote, even though the person, who later was involved in a serious automobile accident, was a minor. Bob [Rose] was in the majority. Imagine the increased cost of insurance if all bars and restaurants were responsible for whatever injury a patron caused after leaving the establishment.

(Emphasis added.)

I consider Justice Rose's participation in the Hinegardner case as inappropriate as the instant case, but his participation was not challenged in Hinegardner. When Hinegardner was decided by the margin of Justice Rose's vote, our colleague benefitted directly from avoiding the necessity of paying for "the increased cost of insurance" noted in the letter. He also benefitted from his later sale of

the Sidelines Lounge and Restaurant because the profitability of the business would have reflected the lower insurance costs resulting from his vote in Hinegardner. Moreover, since he still holds a large, secured promissory note on his bar, there is the distinct possibility that he could reacquire ownership of the business without the increased insurance costs that a majority vote favoring Snyder in the instant case could produce.

The letter strongly demonstrates that Justice Rose's personal interest in minimizing insurance costs to his own business was far more than de minimis. Thus the letter's entreaty to "[i]magine the increased cost of insurance if all bars and restaurants were responsible for whatever injury a patron caused after leaving the establishment." (Emphasis supplied.) Given the direct, substantial and personal interest that our bar-owning colleague had, and potentially still has, I consider it self-evident that he cannot sit on this case and avoid the appearance of impropriety that Canon 2 indicates he must avoid.

Moreover, I am of the opinion that the United States Supreme Court case of Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986), has direct application here. In Lavoie, the challenged justice of the Alabama Supreme Court had participated in deciding a case that established a rule of law that would prove beneficial to another case in which he was a litigant. As the Supreme Court noted, "his [the challenged justice's] opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." In concluding that the challenged justice's participation constituted a violation

of the appellant's right to due process, the Lavoie court vacated the judgment of the Supreme Court of Alabama. Other parallels exist between Lavoie and the instant case, viz, in both instances the challenged judge cast the deciding vote and wrote the opinion in the case. Concerning this state of affairs, the High Court wrote:

> [W]e are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote. Here Justice Embry's vote was decisive in the 5-to-4 decision and he was the author of the court's opinion. Because of Justice Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings.

Interestingly, the settlement Justice Embry received in his own case amounted to the "tidy sum" of $30,000, which the Court determined to be sufficient, even minus any attorney's fee he may have had to pay, to establish the "substantially of his interest" in the Lavoie appeal. I suggest that Justice Rose's pecuniary benefit from the Hinegardner decision and potentially from this decision could far exceed the amount of $30,000. Given the amount of annual cost of insurance savings, and the impact of those savings in determining a sales price for his bar and restaurant, it is not unlikely that the amount at stake here was substantially greater than in Lavoie.

The opinion written by Justice Rose and authored by Justice Young on behalf of the majority, declaring himself qualified to sit, is patently inappropriate. By his own act and vote, he fulfills a campaign promise and continues to minimize insurance costs to bars and casinos. Moreover, he provides himself with the assurance that if the buyers of his bar default on their payments to him, he will reacquire his business without having to pay the increased insurance premiums that were of such concern in the letter soliciting funds for his reelection to the court.[1] Indeed, the impropriety of the majority's ruling appears compounded by the fact that the rule of law reaffirmed by this case is in clear opposition to that established by the overwhelming majority of courts across the nation which recognize the need to do something about the terrible costs in human lives that results from the presence of intoxicated drivers on our highways. Commercial vendors of alcoholic beverages in these other jurisdictions have survived, but in Nevada this court apparently places a higher value on minimizing insurance costs to bars and casinos than it does on human life.

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[1] Furthermore, if the buyers of our colleague's bar and restaurant do not default in their payments, Justice Rose will continue to reap a profit from his deciding vote in Hinegardner that provided a perceptibly more favorable historical expense of operating factor attributable to the lower insurance rate.

For the reasons noted above, I am forced to separate myself from the ethical standards acceptable to my colleagues in the majority.[1] I therefore dissent.[2] s/s Steffen, C.J.

It is unfortunate that my colleague, Justice Rose, is unable to evaluate this dissent in an objective, forthright manner. Instead, he attacks the dissent as "hypocritical and misleading." It is neither. My colleague's allusion to hypocrisy has reference to Justices Steffen and Springer having assertedly participated in determining their own disqualification in the Whitehead case, claiming that they therefore "did the very same thing [as Justice Rose is doing here] in the Whitehead case in which they were extremely interested." He is wrong. In Whitehead, the actual substantive challenges to Justice Steffen and Springer were decided only by Justice Shearing, Sr. Justice Zenoff, and District Judge Guy in orders filed with the court on January 31, 1994 and February 18, 1994, respectively. The latter order denied the third challenge to the two justices. The only participation the challenged justices were involved in regarding the issue of their disqualification is found in Whitehead v. Comm'n on Jud. Discipline, 110 Nev. 380, 422-30, 873 P.2d 946, 972-77 (1994), where the court patiently again explained why there was no basis for disqualification as ruled by Justice Shearing, Sr. Justice Zenoff and District Judge Guy. Indeed, the referenced three justices, in their order of February 18, 1994, referenced the cited case issued the same day, and held that Justices Steffen and Springer had no personal financial interest in the outcome of the case and that there was no due process basis for challenging any justices' continued participation in the case.

Moreover, the nature of the challenge in Whitehead was entirely different that the instant case. The "financial interest" alluded to by Justice Rose and raised against Justices Steffen and Springer by the Attorney General was not only expressly eliminated by a waiver of liability by the two justices (as held in the February 18, 1994 order by the three other members of the court), but the Commission conceded that the two justices had no disqualifying financial interest in the outcome of the Whitehead litigation. It is also worthy of emphasis that unlike here, neither Justice Steffen nor

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Justice Springer was the "swing vote" on any aspect of the issue of disqualification; they simply did not participate in determining the issue concerning their qualification to sit in the Whitehead case. Finally, unlike the instant case, Justices Steffen and Springer were not "extremely interested" in the Whitehead case other than to see it through to an honorable conclusion as required by their oaths of judicial office. It is apparent here that irrespective of actual intent, Justice Rose is fulfilling the promise of the campaign letter sent out on his behalf to raise campaign funds. Justice Rose provided to the author of the letter the citation to the Hinegardner case, cited in the letter as an example of how he looks out for the interests of bars and saloons.

My colleague also advances the novel proposition that I should have "whimpered" at his participation in Hinegardner if I entertained thoughts of impropriety over his sitting on the court. To my knowledge, a judge is on his honor and oath to recuse himself if there is a disqualifying bias. The members of the court have been under no obligation, and indeed could not be without a legion of full-time investigators, to determine whether an unchallenged justice is sitting on a case improperly. The question now raised with respect to Hinegardner is brought into sharp focus by the present case, and the fact that Justice Rose gave the Hinegardner cite to one or more persons for use in his reelection campaign.

Finally, Justice Rose indicated that the dissent is misleading because (at least in part) I stated that the [Exhibit A] "letter was 'on behalf of the campaign,' and that is simply false." I leave it to the reader to determine whether the letter is on behalf of Justice Rose's reelection campaign. Unless my senses have been terribly dulled, it appears that the letter was sent for the express and singular purpose of soliciting funds for none other than Justice Rose in his reelection campaign, and that the letter indicates how the prospective contributors will be rewarded by helping to reelect "Bob" to the court. If Justice Rose can advise me on whose behalf the letter was sent other than his own, I will be happy to consider any modification necessitated by the facts.

This dissent, if embarrassing to my colleague, has such an effect only because of the facts surrounding the question of his qualification to sit. I did not create the facts, and the reasons expressed concerning the propriety of his qualification to sit are forthright and in no sense an exercise created to either "criticize or embarrass" my colleague. Indeed, I truly regret the necessity of having to write this dissent. Moreover, the fact that Justice Rose is the "swing vote" on the matter of his own disqualification represents a factor or condition with which he is comfortable. I am not.

Giving my colleague the benefit of all doubt as to whether he is able to hold the balance nice, true and clear in this case, I simply return to Canon 2 of the Nevada Code of Judicial Conduct and ask the readers whether, in their view, the facts described herein create an appearance free of impropriety.

[2]I also note the possibility that the majority's decision, as per Lavoie, could later be subject to vacation under a due process challenge stemming from Justice Rose's clear interest in the outcome of this case. Whether finality will therefore be achieved by the majority's ruling is more than slightly problematical.

SPORTS PUB

SAL'S

SIDELINES

STAGE DOOR CASINO

Dear Colleague,
October 26, 1994

We have joined together to write this letter to you because we feel that the information we have to give you is of the utmost importance to our business.

This letter is to recommend Chief Justice Bob Rose for election to a second term on the Nevada Supreme Court. We have known Bob for years and think he has earned the right to a second term.

First, he has proven to be an excellent Justice. He is a tireless public servant, and his decisions have been logical and sound. He is also fighting to reform the entire court system to make it more efficient, accessible, and user-friendly.

Second, Bob understands the gaming-liquor industry because he has held a limited gaming and liquor license for more than ten years. He well knows the benefits and problems of these privileged licenses--the burdens of heavy regulation and that the difference between a profit and a loss is often a matter of a few percentage points. A summary of a few of the major cases reflecting his sensitivity to our industry is enclosed--please read them.

What we all need to realize is how big a part of the Supreme Court Justice Rose plays in setting of precedents that end up making the rules that we as business people have to live by. This includes handling of cases dealing with SIIS, State Unemployment Taxes, State and local gaming and liquor regulations, firing at will, liability cases that effect our insurance, etc.-**All of which effect us**

We ask for your support for Justice Bob Rose this year and hopefully a campaign contribution. If all of us gave $100.00 to the campaign, it would probably ensure his victory. Campaign contributions should be made out to Nevadans for Justice Rose and sent to 631 No. Stephanie St., #187, Henderson, Nevada 89014.

Bob's election is a good bet--for you and the State of Nevada. This is an important issue to each of our livelihoods.

Sincerely yours,

Sal's

s/s Salvatore J. Cammarano

Kurt's Backstop BC

s/s Kurt Erick

Stage Door Casino

s/s Randy Markin

Sidelines

s/s Steve McLaughin

In Hinegardner v. Marcor Resorts, 108 Nev. 1091, 844 P.2d 800 (1992), the Nevada Supreme Court upheld the Nevada dram shop protection for bars and casinos by a 3-2 vote, even though the person, who later was involved in a serious automobile accident, was a minor. Bob was in the majority. Imagine the increased cost of insurance if all bars and restaurants were responsible for whatever injury a patron caused after leaving the establishment.

Palmer v. Del Webb's High Sierra, 108 Nev. 673, 838 P.2d 435 (1992), the Nevada Supreme Court held that a worker's injury from cigarette smoke allegedly acquired in a casino-bar was not an occupational disease for the purposes of SIIS benefits. If the Nevada Supreme Court had held otherwise, the additional cost and the raise in everyone's premiums might have destroyed an already shaky system.

Chief Justice Rose believes in strong but fair DUI enforcement. He also believes that a person accused of a DUI should be in actual control of the vehicle and not just sleeping in the car. "For the reasons stated, I believe that Leanette Isom, sound asleep on the front seat of a vehicle parked in a vacant lot of a closed business, was not in actual physical control of the vehicle when arrested. Accordingly, I dissent from the majority's opinion." Isom v. State, 105 Nev. 391, 396, 776 P.2d 543, 547 (1989).

Sound Judgement--tough leadership--Robert E. Rose, Nevada Supreme Court

Join us in helping this fine man get re-elected.

Springer, J., dissenting:

I join in Justice Steffen's dissent, but file this separate dissent because I think more has to be said about Justice Rose's authoring[1] an opinion in which he decides a controversy relating to his own eligibility to sit in this case. I address the propriety of a supreme court justice's deciding matters relating to his or her own qualifications, with particular reference to the manner in which this point is argued by Justice Rose in his majority opinion and in his concurrence to the majority opinion.

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[1]The majority opinion in its present form was presented to me by Justice Rose, accompanied by the explanatory legend "From the Chambers of ROSE, J.," as were several previous drafts of the majority opinion. I complain in this dissent that Justice Rose should not be participating in an opinion (much less authoring an opinion) in which he makes such factual findings as "Snyder and her attorney had actual knowledge of Judge Rose's restaurant/bar ownership well prior to our decision in November, 1994" and such legal conclusions as that Justice Rose's bar ownership "did not create a direct, ongoing pecuniary interest such that would disqualify him from participation in this case." These are hotly-disputed fact issues and legal issues that should be presented to an impartial tribunal rather than being decided by Justice Rose.

I would note that Justice Rose's majority opinion now appears on its face to have been authored by Justice Young; but this, of course, is impossible because the majority opinion is merely an almost-identical variant of an opinion first circulated by Justice Rose on December 13, 1995, accompanied by a memorandum in which Justice Rose states: "I circulate this draft denying the motion filed by the appellant." I object to Justice Rose's writing an opinion deciding conflicting factual and legal issues relating to his own qualifications, even as a ghost-writer for Justice Young. (emphisis supplied)

Justice Rose is correct in identifying the "threshold issue" as being whether Ms. Snyder had "actual or constructive notice of Justice Rose's ownership of a restaurant/bar in Las Vegas prior to our decision in this case and is thereby precluded from now asserting this motion pursuant to NRAP 35." The thrust of Justice Rose's argument on this threshold issue is that it is too late for Ms. Snyder to raise the question of the Justice's bias because her former attorney knew about Justice Rose's tavern when this case was first decided.

Under PETA v. Bobby Berosini, Ltd., 111 Nev. 615, 895 P.2d 1269 (1995), the majority agrees, if Snyder did not know that Rose was a tavern owner when the present case was decided against her, she is entitled to have her disqualification motion decided by the court, rather than having it rejected for technical reasons. Justice Rose argues against Ms. Snyder's position in two ways. First, he says that everyone knew that he owned the Sidelines Bar in Las Vegas and that the "public at large" has "constructive notice" about "Justice Rose's restaurant/bar ownership." Not content to rely entirely on the supposed common knowledge about his business interests (the argument being that Ms. Snyder must have known Justice Rose was a bar owner because she is part of the "public at large"), Justice Rose relies secondarily on his contention that Ms. Snyder's former attorney, Mr. McKenna, supposedly admitted to Justice Rose's campaign manager, Clark Santini, that he knew "that Justice Rose owned a bar in Las Vegas." Therefore, claims Justice Rose, Ms. Snyder "waived any disqualification claim by not asserting it sooner" and "her motion to disqualify [is] insufficient as a matter of law."

Ms. Snyder, of course, denies knowing about Justice Rose's bar interests until after the time that he cast his deciding vote in her case. Justice Rose's decision to deny Ms. Snyder's motion to disqualify him appears to rest primarily[2] on whether Justice Rose's campaign manager is telling the truth when he claims that Mr. McKenna told him that he knew Justice Rose owned a bar at the time he was deciding this bar-liability case. I suggest that some jurist other than Justice Rose ought to be deciding these fact-intensive issues.

Even if we were to accept Justice Rose's fact-finding that Ms. Snyder's former attorney knew that Justice Rose was a bar owner at the time Justice Rose decided this case against her, another critical legal issue remains, namely, whether Ms. Snyder's former attorney's knowledge, uncommunicated to Ms. Snyder, should be an absolute bar to Ms. Snyder's challenging Justice Rose's bias at this juncture. My own opinion is that it should not be. Justice Steffen's opinion is that it should not be. The third, deciding judge of this issue should be some impartial jurist, and not Justice Rose.

Reverting to argument ad hominem, Justice Rose characterizes my objection to his participation in the decision to deny Ms. Snyder's challenge as being "hypocritical." Justice Rose offers two bases for branding my as a hypocrite, namely that I should have raised the issue at the time that he

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[2]I reject out of hand and without discussion Justice Rose's contention that Ms. Snyder must have known about his bar ownership at the time this case was decided against her because the "public at large" knew that he was a bar-owner.

was voting in favor of bar interests and, further, that in another case I did the "very same thing" that he is now doing.

Putting aside the unseemliness of a supreme court justice, in published judicial opinion, calling his colleague a hypocrite, I answer his charges as follows: (1) I was under no duty to challenge Justice Rose's decision to case the deciding vote in either this case or the Hinegardner case; (2) I have not sat in judgment of my own qualifications, as claimed by Justice Rose; and, even if Justice Rose's charge were true, this would not justify his being the deciding vote in denying Ms. Snyder's challenge of his impartiality in cases involving bars and taverns.

Justice Rose remarks that when he cast the deciding vote in this case, I did not, at our decision conference, make "a whimper of any concern." The reason that I did not whimper is that I have been unable to predict whether Justice Rose is going to disqualify himself in bar and casino cases. To his credit, I must say that in most bar and casino cases Justice Rose does disqualify himself. Once in a while, however, unpredictably, he will sit on one of these cases. (For example: Trump v. District Court, 109 Nev. 687, 857 P.2d 740 (1993). I know of nothing in the Code of Judicial Conduct that would require me to monitor Justice Rose's decisions to sit or not to sit in any given case.

With regard to Justice Rose's charge that I did the same, unacceptable thing that he is doing, I would first say that if I had sat in judgment of a challenge of my own qualifications, it would have been wrong for me to do so.

The fact of the matter is that I did not[3]; but, if I had done so, this certainly would not provide justification for Justice Rose's doing so.

Because I disagree with his insistence upon sitting in judgment on this motion to disqualify him, Justice Rose calls me a hypocrite and imputes bad motives to me for filing this dissent. I am saddened that Justice Rose would make an embarrassing spectacle out of what seems to me to be a matter that is almost beyond dispute, namely that a supreme court justice should not be passing judgment on factual and legal issues that bear on his own eligibility to sit in a case.

s/s Springer, J.

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[3]Justice Rose claims that in the Whitehead case I did the same thing that he is now trying to do--to pass judgment on my own qualifications. This is not true. When a challenge to my qualifications was filed in the Whitehead case, I immediately withdrew, and the motion was submitted to and decided by the remaining members of the court (Justice Shearing, Senior Justice Zenoff and District Judge Guy). I will not take the time to recount the tortured history in Whitehead of the challenges that has "been improperly tendered...for a serial, fourth time." Whitehead v. Comm'n on Jud. Discipline, 110 Nev. 380, 422, 873 participation in the various Whitehead opinions did not touch on my own qualifications to sit but, at most, after the motions had been decided by the other three members of the court, to rule that, based on the court's prior ruling on the "legal insufficiency" of the motions to disqualify, the "Commission was not entitled to hearing" on the already-decided motions. (Majority Opinion at 10). If this is the "same thing" as Justice Rose's ruling that he had no pecuniary interest in this case, this still would not justify Justice Rose's ruling to reject Ms. Snyder's challenge to his qualifications to decide her case.

IN THE SUPREME COURT OF THE STATE OF NEVADA

REMITTITUR

DATE: May 13, 1996
TO: Honorable Steve Bowles, Clerk
RE: SHAWNA SNYDER vs. JOSEPH VIANI, ET AL.

NO. 23726 DIST. CT. NO. 7256

Pursuant to NRAP Rule 41, enclosed is (are) the following:

___ Certified copy of Judgment and copy of Order.
_X_ Certified copy of Judgment and copy of Opinion.
___ Certified copy of Judgment and Opinion.
_X_ Receipt for Remittitur. (County Clerk please sign below and return. Retain the attached copy for your records.)
_X_ Record on Appeal. Volumes_____.
___ Exhibits_____.
___ Deposition(s) of_____.
___ Memorandum of Costs and Disbursements.
___ Other_____.

cc: Hon. John P. Davis, District Judge
Peter Chase Neumann
Erickson, Thorpe & Swainston
Bradely, Drendel & Jeanney

Issued by: s/s J. Richards
Chief Deputy Supreme Court Clerk

sp

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWNA SNYDER, AS THE SPECIAL ADMINISTRATRIX OF THE ESTATE OF DANIEL PATRICK LOVETT, DECEDENT,

Appellant,

vs.

JOSEPH VIANI, INDIVIDUALLY AND D/B/A JOE'S TAVERN; TOMMY JO MONTOYA; TAMMY ADAMS; Et. Al.,

Respondents.

No. 23726

FILED FEB 01 1995
Janette M. Bloom
Clerk of Supreme Court
By s/s Janette M. Bloom
Deputy Clerk

MOTION TO DISQUALIFY JUSTICE ROSE, TO VACATE THE COURT'S OPINION, AND TO REMAND THE DECISION FOR FURTHER PROCEEDINGS

COMES NOW appellant, SHAWNA SNYDER, as the Special Administratrix of the Estate of Daniel Patrick Lovett, Decedent, acting by and through her counsel, Peter Chase Neumann, and hereby moves the Court to enter its order:1) disqualifying Justice Rose from further participation in these proceedings; 2) vacating the Court's Opinion; and, 3) remanding this case for further proceedings before non-disqualified judges.

This motion is made pursuant to Rules 35 and 40 of the Nevada Rules of Appellate Procedure and is made upon the grounds of "fraud or like illegal conduct of which the challenging party had no notice until after the contested matter was considered," as is set forth more particularly below.

Pursuant to NRAP 35(a), appellant and her counsel tender the following in support of such motion:

- The Affidavit of Peter Chase Neumann, attached hereto as Exhibit "A" and incorporated herein by this reference;

- The Affidavit of SHAWNA SNYDER, together with supporting exhibits, collectively attached hereto as Exhibit "B" and incorporated herein by this reference;

• The Affidavit of Kenneth J. McKenna, attached hereto as Exhibit "C" and incorporated herein by this reference; and,

• Evidence that Justice Rose was granted a waiver by the Nevada Gaming Commission to be licensed to operate slot machines, on the express condition that he not sit on "gaming" cases, attached hereto as Exhibit "D" and incorporated herein by this reference;

• A list of cases decided by this court, in which Justice Rose has disqualified himself, attached hereto as Exhibit "E" and incorporated herein by this reference;

• The following Memorandum of Points and Authorities incorporated herein by this reference.

DATED this 30th day of January, 1995.

s/s Peter Chase Neumann
Peter Chase Neumann
P.O. Box 1170
Reno, Nevada 89504
(702) 786-3750
Attorney for Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

A MOTION FOR DISQUALIFICATION OF A SUPREME COURT JUSTICE IS TIMELY UNDER NRAP 35(a), THOUGH A CONTESTED MATTER HAS BEEN DECIDED, WHERE THE DISQUALIFICATION ARISES BY VIRTUE OF FRAUD OR LIKE ILLEGAL CONDUCT

NRAP 35(a) provides, in relevant part, as follows:

> Any ground for disqualification or recusal of a supreme court justice that is not raised in a timely manner through the filing of a formal motion or charge shall be deemed waived. In cases or proceedings before the Supreme Court of Nevada, motions or charges seeking the disqualification or recusal of a justice must not be based on any ground that the moving party has theretofore omitted to raise formally as soon as possible after receiving either actual or constructive notice thereof. In no event will the supreme court deem timely any motion or charge seeking disqualification or recusal of a justice who has heard argument upon, or otherwise considered, any contested matter in the cause, except as to grounds based upon fraud or like illegal conduct of which the challenging party had no notice until after the contested matter was considered. (Emphasis added.)

THE FAILURE BY JUSTICE ROSE TO DISCLOSE MATERIAL FACTS UNDER THE CIRCUMSTANCES OF THIS CASE PLACES IT SQUARELY WITHIN RULE 35, N.R.A.P.

Under established Nevada law, the failure to disclose a material fact may be the basis for a finding of fraud. For example, in Villalon v. Brown, 70 Nev. 456, 467, 273 P.2d 409 (1954), this Court held as follows:

> The suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist. (Emphasis added.)

> Similarly, in Epperson v. Roloff, 102 Nev. 206, 719 P.2d 799 (1986), the Court reversed a trial court's entry of summary judgment upon a fraud claim. The Court held that triable issues of fact existed as to whether the defendants, vendors of real property, were under a duty to disclose material facts uniquely within their knowledge and whether they had breached such duty by failing to disclose such facts to purchasers of the real property. And the Court has repeatedly defined "extrinsic fraud" for purposes of NRCP 60 to include "any . . . act or omission" which procures his or her opponent's absence. See e.g. Colby v. Colby, 78 Nev. 150, 154, 369 P.2d 1019 (1962); emphasis supplied. Cf. Goldstein v. Hanna, 97 Nev. 559, 635 P.2d 290 (1981) (Where there is a duty to speak,

silence can raise an estoppel quite as effectively as can words).

It will be demonstrated below that Justice Rose was under a duty to disclose several material facts to SHAWNA SNYDER, prior to undertaking to participate in the consideration of her appeal. Among these were:

1. That Justice Rose had, at the time he sat on this case, an ownership interest in a tavern that could be adversely affected by a ruling in favor of SHAWNA SNYDER upon her appeal.

2. That, during his recent judicial campaign, Justice Rose had, through his employees and campaign staff, made statements that publicly committed, or appeared to publicly commit, him to voting adversely to the position of SHAWNA SNYDER in her appeal.

It will be further demonstrated that Justice Rose's failure to disclose these facts resulted in the violation of several Canons of the Nevada Code of Judicial Conduct.

JUSTICE ROSE'S FAILURE TO DISCLOSE THE FACTS AND CIRCUMSTANCES THAT SHOULD HAVE LED HIM TO DISQUALIFY OR RECUSE HIMSELF IN SHAWNA SNYDER'S APPEAL

The Affidavit of SHAWNA SNYDER reveals the following, indisputable facts:

• Justice Rose was the deciding vote leading to the Court's Opinion filed November 30, 1994.

• At the time Justice Rose participated in SHAWNA SNYDER's appeal, he owned 100% of the stock of Sidelines, Inc., a Nevada corporation which operates a tavern in Southern Nevada.

• At the time Justice Rose participated in SHAWNA SNYDER's appeal, there was a sale of his shares in Sidelines, Inc., for a purchase price of $2,650,000.00 over and above the corporation's existing indebtedness.

• During the period in which SHAWNA SNYDER's appeal was under submission to this Court, an employee of Justice Rose, one Steve McLaughlin, was disseminating a campaign letter seeking contributions to Justice Rose's re-election bid from others involved in the liquor industry.

• The dissemination of this letter was specifically authorized by Justice Rose's campaign staff-member, Jason Linde.

• In such letter, Justice Rose's bar manager made several statements which were clearly intended to inform fellow tavern owners that it was in their direct and substantial financial interest to have Justice Rose voting on the Court in cases in which the interests of the bar business were implicated.

• More specifically, Justice Rose's employee pointed out that Justice Rose was the deciding vote in a prior dram shop liability case, Hinegardner v. Marcor Resorts, 108 Nev. 1091, 844 P.2d 800 (1992), where the Court, by a 3-2 majority, refused to recognize liability of a tavern owner for serving alcoholic beverages to a minor, who was then involved in a serious automobile accident.

• This letter portrayed Justice Rose's involvement in such cases as "an important issue to each of our livelihoods"

JUSTICE ROSE HAD A DIRECT AND SUBSTANTIAL INTEREST IN SHAWNA SNYDER'S APPEAL AND WAS DISQUALIFIED FROM PARTICIPATING IN THE CONSIDERATION OF HER CASE

An impartial tribunal is a fundamental component of procedural due process. Schweiker v. McClure, 456 U.S. 188, 195 (1982); Patrick v. Miller, 953 F.2d 1240, 1245 (10th Cir. 1992). It is "absolute in the sense that it does not depend upon the merits of a claimant's substantive assertions . . .." Carey v. Piphus, 435 U.S. 247, 266 (1978). Cf. Soebbing v.Carpet Barn Inc., 109 Nev. 78, 847 P.2d 731 (1993) (Party's right to notice and opportunity to be heard does not depend upon merits of party's case). A litigant meets his or her burden of showing a due process violation by establishing that a judge has a "direct and substantial interest" in the outcome of the litigation. Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972); see also Aetna Life Ins. v. Lavoie, 475 U.S. 813, 825-26 n. 3 (1986).

In Concrete Pipe & Prod. v. Const. Laborers Pen. Tr., ___ U.S. ___, 113 S.Ct. 2264 (1993), the High Court reviewed some of its decisions concerning disqualifying interests. The Court said:

> "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." Tumey v. Ohio, 273 U.S. 510, 522 (1927). Before one may be deprived of a protected interest, whether in a

> criminal or civil setting, see Marshall v. Jerrico, Inc., 446 U.S. 238, 242, and n. 2 (1980), one is entitled as a matter of due process of law to an adjudicator who is not in a situation "'which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true . . ..'" Ward [v. Village of Monroeville], 409 U.S. [57] at 60 (quoting Tumey, supra 273 U.S., at 532). Ever. an appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator. 409 U.S., at 61.
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> "[J]ustice," indeed, "must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." Marshall v. Jerrico, Inc., [] 446 U.S., at 243 (citations and internal quotation marks omitted).
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> Id., at ___, 113 S.Ct., at 2277.

These principles of procedural due process have been recognized and applied by this Court In re Ross, 99 Nev. 1, 656 P.2d 832 (1983). There the Court said:

> The United States Supreme Court has made it clear that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."

> Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). It has further said: "Not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" Withrow v. Larkin, 421 U.S. 35, 48 (1974); Gibson v. Berryhill, 411 U.S. 564 (1973).

In Aetna Life Ins. v. Lavoie, supra, the U.S. Supreme Court considered an argument that a state supreme court justice had wrongfully participated in a case in which he had a disqualifying interest. The underlying action was an insurance bad faith case in which an Alabama jury awarded $3.5 million in punitive damages to the plaintiff. The judgment was affirmed in a 5-4 per curiam decision of the Supreme Court of Alabama, which was written by Supreme Court Justice Embry. While a motion for rehearing of the appeal was pending, the appellant learned that Justice Embry had filed two actions against other insurance companies in an Alabama court, alleging bad-faith failure to pay claims and seeking punitive damages.

The Court addressed the question of what constitutes a disqualifying interest. In doing so, it reviewed some of its pivotal precedents; the Lavoie Court, after briefly discussing Tumey, supra, said:

> More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due

> Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." In re Murchison, 349 U.S. 133, 136 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with precision." Ibid. Nonetheless, a reasonable formulation of the issue is whether the
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> > "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" Ward v. Village of Monroeville, 409 U.S., at 60.

Lavoie, 475 U.S., at 822; see also Exxon Corp. v. Heinze, 32 F.3d 1399, 1403 (9th Cir. 1994).

Thus, while a "direct and substantial interest" (Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972)) "cannot be defined with precision" (In re Murchison, 349 U.S. 133, 136 (1955)), it can be measured by determining whether, under all the facts and circumstances, there would be a "possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." Ward, 409 U.S., at 60; internal quotation marks omitted.

After reviewing all of the relevant circumstances, the Supreme Court determined that Justice Embry's interest in his own bad-faith cases disqualified him from participating in the Lavoie case. One of the factors considered by the Supreme Court was that the Lavoie case was a final pronouncement of Alabama's highest court and, therefore, the decision would have effect as legal precedent on cases in which Justice

Embry had an interest.[1] The Court vacated and remanded the Alabama Supreme Court's decision.

Another instructive case is State of Cal. v. Kleppe, 431 F.Supp. 1344 (C.D. Cal. 1977). As in Lavoie, the disqualified judge in Kleppe did not have an interest in any of the parties directly before the Court. The judge in Kleppe owned shares of stock in Union Oil Company. While Union Oil was not a party to the proceedings, its fortune could have been affected by the precedent setting effect of the decision. This, in turn, could have affected the value of the judge's ownership interest. Thus, both Lavoie and Kleppe support the proposition that a judge may have a disqualifying interest in a case--regardless of the fact that he has no direct interest in any of the parties before the court.

The circumstances surrounding Justice Rose's ownership of Sidelines tavern, particularly when viewed in light of his campaign literature, presents a situation "'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972). During the time in which SHAWNA SNYDER's appeal was under submission to the Court, Justice Rose publicly announced his intention to protect his own private interests, as well as those of his fellow tavern owners. Indeed, he sought to gain political campaign contributions, as well as election votes, by asserting, in effect, that he would not "hold the balance nice, clear and true." Id. He pledged his judicial vote, in advance, to the causes which would further his own interests and the parallel interests of other bar owners.

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[1]Note that Lavoie did not rest upon any assertion that Justice Embry had a direct interest in the case against Aetna Life Insurance Company.

It is anticipated that those who oppose SHAWNA SNYDER's motion will contend that Justice Rose's interest is not sufficiently "direct and substantial" to disqualify him from participating in this dram shop liability case. However, that is not what Justice Rose, through his employee Steve McLaughlin, was telling fellow tavern owners in the campaign letter. The clear, indeed, the urgent message was that all Nevada tavern owners had a direct and substantial financial interest in having Justice Rose participating in dram shop cases. The interest was characterized as being sufficiently direct that the very "livelihood" of Nevada tavern owners depended upon Justice Rose's votes in these cases. Because Justice Rose is, himself, a tavern owner, it can hardly now be contended on his behalf that there is an insufficient connection between his ownership interest and his participation in the case to warrant disqualification.

JUSTICE ROSE HAS PROMISED TO DISQUALIFY HIMSELF FROM ALL "GAMING" CASES, AND AND HIS OWN GAMING LICENSE TO OPERATE SLOT MACHINES IN NEVADA SO REQUIRES

In December, 1987 the Nevada Gaming Commission approved the application of then District Judge Robert Rose to hold 100% ownership interest in the slot machines at the Rainbow Too Club in Las Vegas. The Gaming Commission issued a gaming license to Judge Rose. However, the license was issued on the express condition that he not rule on gaming cases. District Judge Rose, when he took office as a judge, was granted a waiver by the Gaming Commission to have a gaming license for slot machines at another location. That license, too, was conditioned upon Judge Rose disqualifying himself in all gaming cases. (See, Exhibit "D" attached hereto).

In June, 1989, Justice Rose was awarded Nevada Gaming Commission approval to operate 15 slot machines at the Rainbow Two liquor and gaming establishment on Sunset Road in Henderson, Nevada. That gambling license lists Justice Rose as the 100% owner, president and director of Sideline, Incorporated. This is the same business for which Steve McLaughlin, as the general manager, wrote the Rose Campaign solicitation letter referred to above. (See Exhibit "B," Affidavit of Shawna Snyder and supporting documents attached hereto).

Justice Rose has disqualified himself from sitting as a Supreme Court Justice in numerous "gaming business" cases.[2] A partial list of these cases is attached hereto as Exhibit "E," containing the names and citations of more than fifty cases in which Justice Rose voluntarily disqualified himself, 22 of which are "gaming" cases.

Accordingly, it would have not been unusual or extraordinary for Justice Rose to have disqualified himself in the instant case of Estate of Lovett vs. Joe's Tavern. Surely his financial interest in gaming is no more important than his financial interest in the liquor industry. And certainly, the

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[2] But not all gaming cases. For example, Justice Rose failed to disqualify himself on the case of Donald Trump vs. District Court, 109 Nev. 687, 857 P.2D 740 (1993), involving the Golden Nugget Hotel & Casino, GNLV Corp., Trump Taj Mahal Associates (a New Jersey general partnership doing business as Trump Taj Mahal Casino Resort in Atlantic City, New Jersey), and Trump Plaza Hotel & Casino (Trump Plaza) in Atlantic City. In addition, Justice Rose sat on the case of Hinegardner v. Marcor Resorts, 108 Nev. 1091, 844 P.2d 800, casting the swing vote in favor of Marcor Resorts, which is a gaming licensee in Nevada. It was this case that Justice Rose's bar and casino manager, Steve McLaughlin, cited in the October 26, 1994 campaign solicitation letter attached to "Exhibit B" attached hereto.

right of due process, which includes the right to a fair and impartial tribunal, does not distinguish between the type of financial "interest" which is disqualifying for a judge. Indeed, it can be argued that Justice Roses's swing vote on the issue of dramshop liability has a potentially more direct effect on one of his financial interests (the liquor industry) than would a vote in a "gaming industry" case.

EVEN IF IT IS DETERMINED THAT JUSTICE ROSE HAD NO FINANCIAL INTEREST IN THE OUTCOME OF SHAWNA SNYDER'S APPEAL, HIS PARTICIPATION CREATED A DISQUALIFYING APPEARANCE OF IMPROPRIETY

As noted in the quotation from Concrete Pipe & Prod., "[J]ustice," indeed, "must satisfy the appearance of justice." As Justice Scalia recently reminded us: "Wise observers have long understood that the appearance of justice is as important as its reality." J.E.B. v. Alabama ex rel. T.B., ___ U.S. ___, ___ n. 3, 114 S.Ct. 1419, 1438 n. 3 (1994) Scalia, J., dissenting. Thus, the United States Congress has enacted 28 U.S.C. § 455(a), which provides that a judge is disqualified where his impartiality might reasonably be questioned. See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988).

Similarly, Canon 3E of the Nevada Code of Judicial Conduct provides, in pertinent part, as follows:

CANON 3

A judge shall perform the duties of judicial office impartially and diligently.

E. Disqualification.

> (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, . .. (Emphasis added.)

The Commentary to this Canon states, in part, as follows:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

The question of whether a judge's impartiality might reasonably be questioned calls for the application of an objective standard. In Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir.), cert. denied, 499 U.S. 820 (1980), the Court held that the test is whether an objective, disinterested lay observer, fully informed of the facts underlying the grounds upon which recusal was sought, would entertain a significant doubt about the judge's impartiality. In light of the facts set forth above, it is clear that a lay observer, informed of such facts and circumstances, would entertain a significant doubt about Justice Rose's impartiality in SHAWNA SNYDER's case. See also Tyson v. State, 622 N.E.2d 457 (Ind. 1993), where the Chief Justice of the Supreme Court of Indiana recused himself in the highly publicized case against Michael Tyson. The Chief Justice's decision resulted from a very brief, innocent conversation which the judge's wife had with defense counsel, Alan Dershowitz. Notwithstanding the innocuous nature of the grounds for recusal, Chief Justice Shepard wisely observed:

> The test under Canon 3(C)(1) is whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality. Cf. Perkins v. Spivey, 911 F.2d 22 (8th Cir.1990), cert. denied, 499 U.S. 920, 111 S.Ct. 1309, 113 L.Ed.2d 243 (1991). The question is not whether the judge's impartiality is impaired in fact, but whether there exists a reasonable basis for questioning a judge's impartiality. In re Beard, 811 F.2d 818 (4th Cir.1987). Concerns about public confidence in the judicial system underlie Canon 3. See United States v. Hollister, 746 F.2d 420 (8th Cir.1984). A judge has a duty to promote public confidence in the impartiality of the judiciary. Ind. Judicial Conduct Canon 2.

JUSTICE ROSE'S CONDUCT HAS RESULTED IN MULTIPLE VIOLATIONS OF OTHER CANONS CONTAINED IN THE NEVADA CODE OF JUDICIAL CONDUCT

Canon 5A(3)(d)(i) and (ii) read as follows:

CANON 5

A judge or judicial candidate shall refrain from inappropriate political activities.

A. All Judges and Candidates.

. . ..

(3) A candidate for a judicial office:

. . ..

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . ..
(Emphasis added.)

Justice Rose violated Canon 5A(3)(d)(i) and (ii) when, acting through his employee and with the express, prior authorization of his campaign staff, he committed himself to voting against dram shop liability and nearly any other legal result that may adversely affect the liquor industry.

Canons 4A(1) and 4D(1)(a) provides as follows:

CANON 4

A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

A. Extra-judicial activities in general.

A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

D. Financial Activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position . . ..

Justice Rose has violated these Canons. Indeed, he has promised to continue to protect the interests of his fellow tavern owners by capitalizing on his own conflict of interest. Justice Rose's conduct may clearly be perceived as an exploitation of his judicial position to further his own business interests.

Canon 2A provides:

CANON 2

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. (Emphasis added.)

Similarly, Canon 1A provides as follows:

CANON 1

A judge shall uphold the integrity and independence of the judiciary.

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be

> preserved. The provisions of this Code are to be construed and applied to further that objective. (Emphasis supplied.)

Justice Rose's conduct has compromised the integrity and independence of this Court and the Nevada judiciary, in general. At the same time, he has damaged public confidence in the judiciary's impartiality. He has created the impression, indeed he has promoted the impression, that the discharge of his judicial duties is driven by his own private, business interests. There is no evidence that this impression is untrue.

JUSTICE ROSE BENEFITED SUBSTANTIALLY FROM CAMPAIGN CONTRIBUTIONS GIVEN BY LIQUOR LICENSEES AND VENDORS

Although gigantic multinational corporations owning casinos and hotels are not commonly thought of as "taverns," a significant part of their business is the sale of liquor. In fact, the furnishing of alcoholic beverage is an integral part of any successful gaming business. Justice Rose freely accepted the generosity of a number of substantial vendors of liquor in Nevada, during and before his 1994 campaign for the office of Supreme Court Justice. As demonstrated by "Attachment 1" and "Attachment 2" to the Affidavit of Peter Chase Neumann, it appears that since December, 1988 through November, 1994, Justice Rose accepted substantially in excess of one hundred thousand dollars ($100,000) in contributions from liquor licensees in Nevada.

While it might be argued that $106,320.00 in liquor licensee donations represents only a fraction of Justice Rose's overall contributions, it is still substantial enough that reasonable persons should not disagree that it has created at

least the appearance of more than merely a passing interest in the well being of the liquor industry on the part of Justice Rose. Justice Rose's January 15, 1995 Campaign Contributions Summary (see Attachment 2 of Neumann affidavit), lists the following contributions received:

Total of all contributions over $500.00	$282,925.00
Total of all contributions less than $500	$192,704.00
Total of all, including "in-kind" contributions	$492,302.00

Accordingly, one sees that the $106,320 from identifiable liquor vendors[3], alone, is more than 21.5% of the total. If only 10% of the "$500-or-less" donors were in the wine and spirits industry, that would boost the $106,320 figure to $125,590 -- which would be 25.5% of Justice Rose's overall campaign contributions.

Accordingly, even if Justice Rose had not owned a bar himself, his interest in the well being of the liquor industry must be seen by the citizens of Nevada, and this Court, to be "substantial" merely by reason of the fact that a very substantial percentage of his campaign contributions were derived from that industry.

Justice Rose has disqualified himself from numerous Supreme Court cases involving the "gaming industry." (See Exhibit "D", a list of some of these cases appearing in

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[3] The identity of liquor vendor campaign donors who gave $500 or less to Justice Rose's campaign are unknown, because (perhaps unfortunately) Nevada law does not require such donors to be identified. It is quite possible that of the $192,704 in "$500-or-less" donations, a substantial amount thereof came from the tavern owners who were directly solicited by Justice Rose's campaign manager and the bar manager of his "Sidelines" tavern business.

Nevada Reports.) His failure to do so in the instant case of Shawna Snyder v. Joe's Tavern, as well as Hinegardner v. Marcor Resorts, 108 Nev. 1091, 844 P.2d 800 (1992), is therefore all the more remarkable.

THE DECISION SHOULD BE VACATED AND REMANDED IN ORDER TO PROMOTE SUBSTANTIAL JUSTICE

NRAP 40(c)(2)(ii) provides that the Court will grant rehearings, "[i]n such other circumstances as will promote substantial justice." Surely the interests of substantial justice require that a rehearing be granted under these circumstances. The record demonstrates, beyond dispute, that Justice Rose cast the "swing vote" in SHAWNA SNYDER's appeal. It further demonstrates, beyond dispute, that Justice Rose failed to disclose to SHAWNA SNYDER material facts which, at worst, gave him a financial interest in the outcome of SHAWNA SNYDER's appeal, and, at a minimum would cause a reasonable person to question Justice Rose's impartiality. Justice Rose's conduct also resulted in multiple violations of several other Canons of the Nevada Code of Judicial Conduct. Appellant requests this honorable court to

vacate its decision filed November 30, 1994, and to grant a new hearing before a court comprised of non-disqualified judges.[4]

DATED this 30th day of January, 1995.

s/s Peter Chase Neumann
Peter Chase Neumann
P.O. Box 1170
Reno, NV 89504
(702)786-3750
For Shawna Snyder Lovett

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[4] Appellant respectfully requests that Justice Rose not participate in the deciding of her motion to disqualify him. N.R.S. 1.230(4)

CERTIFICATE OF SERVICE ON OPPOSING COUNSEL

I, the undersigned employee of Peter Chase Neumann Professional Corporation, hereby certify, pursuant to NRCP 5(b), that I caused service to be made by PERSONAL DELIVERY this 30th day of January, 1995, upon the following opposing counsel:

Thomas Beko, Esq.
Erickson, Thorpe, & Swainston
P.O. Box 3559
Reno, NV 89509

William C. Jeanney, Esq.
Bradley, Drendel & Jeanney
P.O. Box 1987
Reno, NV 89505

DATED: Jan. 30, 1995

s/s Peter Chase Neumann
EMPLOYEE

EXHIBITS TOO VOLUMINOUS TO REPRINT IN THIS APPENDIX

They include copies of Justice Roses's Campaign Contributions and Expense Reports filed on the following dates: August 22, 1994, October 24, 1994, November 4, 1994, and January 13, 1995; A copy of a list of campaign contributions to Justice Rose from liquor vendors in Nevada who donated more than $501; A copy of the Memorandum of Points and Authorities; A copy of Shawna Snyder's supplement to motion to disqualify Justice Rose; A copy of the pertinent NRS statutes; A copy of the affidavit of Peter Chase Neumann; A copy of the opposition to motion for relief from automatic stay, filed November 9, 1994; A copy of an offer and acceptance agreement and earnest money receipt, dated July 11, 1994; A copy of a personal guarantee, Exhibit B; A copy of a non-compete agreement, Exhibit C; A copy of a preliminary title report, Exhibit D; A copy of a Las Vegas Sun article concerning Justice Rose, Exhibit 3; Copies of certifications, Exhibits D-1, D-2, D-3, D-4, D-5. Also included, is a copy of a list of cases in which Justice Rose disqualified, Exhibit E.

AFFIDAVIT OF KENNETH J. McKENNA, ESQ.

STATE OF NEVADA

COUNTY OF WASHOE

I, Kenneth J. McKenna, Esq., do hereby swear under the penalty of perjury that the assertions of this affidavit are true:

1. My name is Kenneth J. McKenna, and I reside in Reno, Washoe County, Nevada.

2. I have practiced law in Reno in excess of ten years.

3. I was the attorney for the plaintiff/appellant, SHAWNA SNYDER LOVETT in the case of Shawna Snyder as special administrator of the Estate of Daniel Patrick Lovett, Decedent v. Joseph Viani, d/b/a Joe's Tavern, et al., case no 23726 in the Nevada Supreme Court.

4. On November 6, 1994, I was rendered temporarily unable to practice law, and therefore was no longer able to represent Shawna Snyder.

5. On November 30, 1994, I filed in the Supreme Court, a Motion to Withdraw as Counsel for Shawna Snyder in the above-referenced case.

6. Also on November 30, 1994, I had filed a Motion to Withdraw as Counsel, the 3-2 decision of the Nevada

Supreme Court in the above-referenced case was filed with the Clerk of the Court.

7. At the time I represented Shawna Snyder in the above-referenced case, I did not know that Justice Robert Rose of the Nevada Supreme Court owned an interest in a tavern, or had any interest in the liquor industry.

8. Before the Supreme Court entered its decision in the above-referenced case, I had no discussion with my client, Shawna Snyder, concerning the fact that Justice Rose owned an interest in a tavern.

9. Had I known of Justice Rose's interest in a tavern and in the liquor industry at the time I represented Shawna Snyder, I would have so informed her and discussed with her the possibility of disqualifying Justice Rose from participation in the case.

DATED this 24th day January, 1995.

s/s Kenneth J. McKenna

Subscribed and sworn before me
this 24th day January, 1995.

s/s Melissa A. Barnson

AFFIDAVIT OF SHAWNA SNYDER

STATE OF NEVADA

COUNTY OF WASHOE

I, SHAWNA SNYDER LOVETT, do hereby swear under penalty of perjury that the assertions of this affidavit are true:

1. My name is Shawna Snyder Lovett and I am the appellant in Nevada Supreme Court Case No. 23726.

2. An Opinion was filed by the Nevada Supreme Court in my appeal ;on November 30, 1994.

3. In such Opinion, the Court ruled, by a 3-2 majority, to affirm the trial court's dismissal of my claim for damages against Joe's Tavern, the liquor vendor which intentionally and unlawfully served alcohol to my brother, knowing that he was under twenty-one years of age.

4. After being unlawfully served alcohol by Joe's Taverns, my brother drove a vehicle while intoxicated, crashed, and was killed along with four other victims.

5. On my appeal, Justice rose cast the deciding vote on my appeal, in favor of the liquor vendor and against me.

6. Before the Court's filing of the Opinion on November 30, 1994, I did not know that Justice Rose himself owned a tavern in Southern Nevada, and was a liquor vendor.

7. Before the Court's filing of the Opinion on November 30, 1994, I did not know that Justice Rose had disseminated campaign materials which either committed him, or appeared to commit him, to voting against cases like mine, in which legal responsibility for unlawfully selling liquor to a minor is placed upon the liquor vendor.

8. After the filing of the Opinion on November 30, 1994, I learned that Justice Rose owns 100% of a Nevada corporation named Sidelines, Inc., which operates a liquor tavern at 1195 West sunset Road, Henderson, Nevada. I learned these facts by examining a court document filed in Sidelines, Inc.'s bankruptcy case entitled In re Sidelines, Inc., Case No. BK-S-25100-LBR, now pending in the United States Bankruptcy Court, District of Nevada, Southern Division. A true copy of that document is attached to my affidavit as Exhibit 1.

9. Since the filing of the Opinion on November 30, 1994, I have also learned that Justice Rose, on July 11, 1994, signed an agreement, entitled "Offer and Acceptance Agreement and Earnest Money Receipt", whereby Justice Rose agreed to sell his stock in Sidelines, Inc., for the sum of $2,650,000.00 over and above Sidelines, Inc.'s existing debt. (See Exhibit 1).

10. Since the filing of the Opinion on November 30, 1994, I have also learned that Steve McLaughlin, an employee of Justice Rose, wrote a letter to be sent to Nevada tavern owners soliciting campaign contributions for Justice Rose's Supreme Court re-election campaign. This letter specifically refers to Justice Rose's financial interest in the

liquor industry. a copy of that letter is attached hereto as Exhibit "2".

11. Since the filing of the Opinion on November 30, 1994, I have read an article published in the Las Vegas Sun Newspaper, in which Justice Rose's employee, Steve McLaughlin, is reported to have said that he had checked with Jason Linde, of the Rose election campaign staff, before sending out the solicitation letter, and that he (Linde) told McLaughlin to go ahead with sending the letter. A copy of the newspaper article entitled "Taverns Rally Around Chief Justice," is attached hereto as Exhibit "3".

12. Had I known that foregoing facts before the Court's filing of its Opinion on November 30, 1994, I would have asked my attorney to disqualify Justice Rose from participating in my appeal.

13. Before learning of the foregoing facts, I believed that no judge who had any personal interest in the outcome of my case, could or would be permitted to sit in judgment of the case.

14. My learning of the foregoing facts, which Justice Rose failed to disclose before voting against me in my case, has cast reasonable doubt in my mind upon Justice Rose's

capacity to act impartially as a judge in my case, or any case opposing the liquor industry in Nevada.

FURTHER AFFIANT SAYETH NAUGHT.

s/s Shawna Snyder Lovett

Subscribed and sworn before me
this 23rd day of January, 1995.

s/s Roxanne Polinelli
Notary Public

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWNA SNYDER, AS THE SPECIAL ADMINISTRATOR OF THE ESTATE OF DANIEL PATRICK LOVETT, DECEDENT,

Appellant,

vs.

JOSEPH VIANI, INDIVIDUALLY AND D/B/A JOE'S TAVERN; TOMMY JO MONTOYA; TAMMY ADAMS; MINERAL COUNTY SHERIFF'S OFFICE, A POLITICAL SUBDIVISION; JOHN MADRASO, JR., IN HIS OFFICIAL CAPACITY AS SHERIFF AND INDIVIDUALLY; JOHN LEONHARDT, IN HIS OFFICIAL CAPACITY AS SHERIFF AND INDIVIDUALLY,

Respondents,

No. 23726

FILED
MAR 08 1995 JANETTE M. BLOOM,
CLERK OF SUPREME COURT

RESPONSE OF JUSTICE ROSE TO MOTION TO DISQUALIFY HIM AND REQUEST THAT JUSTICE SPRINGER NOT PARTICIPATE IN THE MOTION TO DISQUALIFY

COMES NOW, Justice Robert E. Rose, and sets forth his opposition to Shawna Snyder's motion to disqualify him in this case. In this response, Daniel Patrick Lovett will be referred to as the drunk driver and his estate, for which Shawna Snyder serves as administrator, as the drunk driver's estate.

INTRODUCTION

The estate of a drunk driver who killed four innocent people is attempting to establish the right to sue Joe's Tavern where the drunk driver had a few drinks five hours before the accident. The five hours immediately prior to the accident were spent by the drunk driver drinking at the El Capitan in Hawthorne. Neither the El Capitan nor the four innocent victims is a party to this lawsuit.

The drunk driver's estate has already received $300,000 from the drunk driver's life insurance policy; but apparently, the estate is not satisfied with this recovery. If a change in the law is to be made, it should not be made to assist the felony conduct of a drunk driver, but rather, to help the innocent victims of the crime. It is puzzling why the advocates against drunk drivers are pushing to change Nevada law in this case where the change will benefit the drunk driver and his estate.

Justice Rose sold the bar and corporation that owns it on July 11, 1994, and the sale has been approved by both the Gaming Control Board and Commission. The new owners are presently on the premises and the escrow will close and the sale consummated this month (March, 1995). Any change in the law concerning the liability of bar owners will not affect Justice Rose because he had entered a written sales agreement last summer and will no longer be a bar owner.

The estate and its attorney had both actual and constructive knowledge that Justice Rose owned a bar in Southern Nevada. Attorney Ken McKenna, who represented the estate prior to the decision of November 30, 1994, was recently suspended from the practice of law for unethical practices, more specifically "ambulance chasing." He has stated to Clark Santini that he knew of Justice Rose's bar ownership well prior to the court's decision. As the affidavit of Clark Santini clearly establishes, Santini had a discussion with McKenna about this case in June, 1994, and about Justice Rose owning a bar in Las Vegas.

> McKenna said he did not know how he would fare with Justice Rose because he knew Justice Rose owned a bar in Las Vegas. . . . It was unmistakable that Ken McKenna knew in June, 1994, that Justice Rose owned a bar in Las Vegas.

Affidavit of Clark Santini. Santini's recollection of the conversation is firm and detailed. The knowledge of Ken McKenna that Justice Rose owned a bar is imputed to his client, the drunk driver's estate, and the motion to disqualify

should have been filed prior to the court's decision. Further, the estate's present attorney, Peter Neumann, not only knew of Rose's bar ownership prior to the decision, but was actively calling and faxing many trial attorneys in Northern Nevada about that fact shortly before the 1994 general election.

In a case decided six years ago by the Nevada Supreme Court, Peter Neumann defended former Justice Elmer Gunderson's participation in the court's decision against charges that Gunderson's family had outside business interests with Peter Neumann. Neumann argued that the world was put on notice of Gunderson's business interests with Neumann by a Federal Communication Commission filing in Washington, D.C., and a legal notice in the Reno Gazette-Journal. See Ainsworth v. Combined Insurance Co., 105 Nev. 237, 774 P.2d 1003 (1989). If that was sufficient notice to apprise the public of a judge's outside interest in a business, then there is no question that everyone in Nevada was on notice that Justice Rose owned a corporation that operated a bar in Las Vegas. This notice included: (1) liquor licenses issued annually to Justice Rose and his corporation by Henderson and Clark County; (2) restricted gaming license issued by Nevada to Justice Rose as evidenced by Exhibit D of the motion to disqualify; (3) judicial disclosure statements filed by Justice Rose indicating his ownership of Sidelines, Inc. and the fact that it was a lounge or sports lounge; and (4) extensive coverage regarding Justice Rose's bar ownership in the 1988 and 1994 general election campaigns, including newspaper articles and radio and television commercials concerning that fact. And, of course, there is the actual notice of Justice Rose's bar

ownership that Ken McKenna possessed as established by the affidavit of Clark Santini attached hereto.

In Nevada, a justice has the legal duty to sit on a case if he or she does not feel disqualified. By the affidavit of Justice Rose, it is obvious that he did not feel disqualified in any way in this case. The drunk driver's estate permitted the Justice to discharge his legal duty by sitting on the case without objection, the estate was dissatisfied with the result, and now moves to disqualify the Justice by unfairly attacking him and asserting grounds for disqualification that have no basis in law or in fact.

After a case has been decided by the Nevada Supreme Court, a party must show "fraud" to disqualify any justice. No showing whatsoever of fraud has been made by the drunk driver's estate. The motion to disqualify is frivolous and clearly meant to embarrass/injure a justice of the Nevada Supreme Court. It is hereby requested that sanctions be imposed on the drunk driver's estate and its attorney.

Justice Springer should not participate in the determination of this motion to disqualify Justice Rose. Justice Springer has shown his hostility and anger with Justice Rose in a recent opinion concerning the Whitehead v. The Nevada Judicial Discipline Commission case. This included accusations by Justice Springer that the enormous criticism Justice Springer and Justice Steffen received in the Whitehead case was because of Justice Rose. Justice Springer claimed that many people in high places had orchestrated this adverse publicity and that:

> One person who helped to convey these three inaccurate impressions was no one less than the chief justice of the supreme court himself, Robert Rose.

Whitehead v. Comm'n on Jud. Discipline, 111 Nev. ___, ___, ___ P.2d ___, ___ (Adv. Op. No. 11, February 24, 1995). Further, Justice Rose and Justice Springer have had a number of personal clashes at the Nevada Supreme Court during the past two years. From these confrontations have come a healthy dislike one for the other. The facts of these clashes and the part played by former Justice Elmer Gunderson in these disputes will be set forth by me in a supplemental response to be filed by Justice Rose. In fairness to the parties and to Justice Rose, it is requested, pursuant to NRAP 35, that Justice Springer not participate in the decision of this motion to disqualify, and it is further requested that an investigation be conducted by the Reno Police Department and/or the Attorney General concerning what appears to be the false affidavit of attorney Ken McKenna.

DATED this 8th day of March, 1995.

s/s Robert E. Rose

POINTS AND AUTHORITIES

I

IT IS THE DUTY OF A JUSTICE OR JUDGE TO SIT ON A CASE AND TO RESIST ATTEMPTS TO DISQUALIFY IF HE OR SHE BELIEVES THERE IS NO BASIS FOR DISQUALIFICATION

The Nevada Supreme Court has always insisted that a justice or judge, as part of his or her official duty, has the obligation to hear a case if the jurist believes he is not disqualified to do so. This requirement of a judge has been called the "duty to sit" doctrine and has been recognized in Nevada for many years. See Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988). The court has also required that any challenge against a justice or judge be supported by facts that establish a clear and unequivocal showing of bias and prejudice. A concise statement of these principles is set forth in Goldman:

> At the outset, we observe that "a judge has as great an obligation not to disqualify himself, when there is no occasion to do so, as he has to do so in the presence of valid reasons." Amidon v. State, 604 P.2d 575 577 (Alaska 1979), citing In Re Union Leader Corp., 292 F.2d 381, 391 (1st Cir. 1961), cert, denied, 368 U.S. 927. Thus, this court has previously held that a judge has "a duty to preside . . . in the absence of some statute, rule of court,

> ethical standard, or other compelling reason to the contrary." See Ham v. District Court, 93 Nev. 409, 566 P.2d 420 (1977); see also United States v. Diorio, 451 F.2d 21, 24 (2d Cir. 1971), cert, denied, 405 U.S. 955 (1972); Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir. 1968); Rosen v. Sugarman, 357 F.2d 794, 797-98 (2d Cir. 1966). Moreover, where, as here, a judge or justice determines that he may not voluntarily disqualify himself, his decision should be given "substantial weight," and should not be overturned in the absence of a clear abuse of discretion. See United States v. Haldeman, 559 F.2d 31, 139 (D.C. Cir. 1976), cert, denied, 431 U.S. 933 (1977); Amidon, 604 P.2d at 577. Further, under these circumstances, a judge or justice is presumed not to be biased, and the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification. Ritter v. Bd. of Com'rs of Adams County, Etc., 637 P.2d 940, 946 (Wash. 1981).

Id. at 649, 764 P.2d at 1299; accord In re Petition to Recall Dunleavy, 104 Nev. 784, 769 P.2d 1271 (1988).

In the Goldman case, District Judge Goldman was removed from office by the Commission on Judicial Discipline and appealed that decision to the Supreme Court, where he sought to disqualify two sitting Supreme Court justices from hearing his case, Justices Young and Steffen.

Goldman asserted that Young should be disqualified because he had written a letter defending actions taken by the court and Commission against Goldman and asserting that those actions were proper. Goldman, 104 Nev. at 650, 764 P.2d at 1299-1300. The challenge to Justice Steffen was based on the fact that he investigated the Goldman case for the court, prepared a document entitled "Certificate in Lieu of Record" that was the basis for the Supreme Court's review of Goldman's actions, and then heard the case at the Supreme Court level. Id. at 652, 764 P.2d at 1300-01. The court unanimously determined that Goldman had not established grounds for actual bias or prejudice to disqualify either justice under NRS 1.225 or the Nevada Code of Judicial Conduct. Id. at 651, 653, 764 P.2d at 1300, 1303.

The affidavit of Justice Rose clearly establishes that he firmly believed he was not disqualified in any way from sitting on the instant case and had an obligation to sit pursuant to the "duty to sit" doctrine. His affidavit further establishes that: (1) the drunk driver's estate and its attorney had actual and constructive knowledge that he owned a bar and had an obligation to file a motion to disqualify him if they did not want him to sit on the case; and (2) Justice Rose's interest in the bar had been sold on July 11, 1994, that the bar and its operation were under the supervision of the United States Bankruptcy Court, and that any decision in favor of the drunk driver's estate would have no future effect or impact on Justice Rose.

The Nevada Supreme Court reaffirmed the principles set forth in the Goldman decision six months later when it decided Ainsworth v. Combined Insurance Co., 105 Nev.

237, 774 P.2d 1003 (1989). In that case, the Supreme Court had reinstated a punitive damages award of $6,000,000, and a petition for rehearing and a motion to disqualify former Chief Justice Elmer Gunderson were filed, based upon Gunderson's participation in the previous decisions in the case. Combined asserted numerous facts that its claimed showed actual or implied bias or the appearance of bias or prejudice against Combined by Gunderson, including:

1. Gunderson openly ridiculed Combined's attorney in court, and referred to him as a "loser" or "losing lawyer" approximately 130 times in Gunderson's response to a motion to disqualify. Gunderson improperly secured the confidential records of one of Combined's attorneys held under lock and key at the court and publicly used it to ridicule that attorney for failing the bar exam. See Response of E.M. Gunderson to Purported "Motions Belatedly Filed by Respondent" filed February 24, 1989.

2. Remarks by Gunderson at the hearing showed a clear animus toward Combined and the entire insurance industry. Ainsworth, 105 Nev. at 256, 774 P.2d at 1017.

3. Gunderson had considered extrajudicial, post-opinion material. Id, at 258, 774 P.2d at 1018.

4. Gunderson admitted to entering the case with a preconceived negative impression of Combined's counsel. Id.

5. Peter Neumann, the attorney for Ainsworth, had acted as the campaign manager for Gunderson in one of his

campaigns for the Nevada Supreme Court. Id, at 260, 261, 268, 774 P.2d at 1020, 1025.

6. Peter Neumann and Gunderson's wife had formed a business venture and made an application with the Federal Communication Commission for a license to operate a television station in Northern Nevada. Combined asserted they had no knowledge of Gunderson's business interest with Neumann and this was grounds for disqualifying Justice Gunderson after the decision.

7. In an unrelated case, attorney Laura FitzSimmons was representing Gunderson personally and had filed an amicus brief on behalf of the Nevada Trial Lawyers Association supporting Ainsworth and opposing Combined's position. Id, at 265, 266, 774 P.2d at 1023, 1024.

In spite of these facts, the court held that the contentions were wholly insufficient to establish any disabling bias or a reasonable inference of impropriety. Id, at 269-270, 774 P.2d at 1026. If there was no disqualification of Gunderson because of his conduct and family business, there cannot be any disqualification of Justice Rose in this case.

One very interesting fact about the Ainsworth case is that Peter Neumann, a close friend of former Justice Elmer Gunderson, was the attorney for Ainsworth and defended Gunderson's right to sit against the disqualification filed by Combined. In doing this, Neumann asserted that the business relationship between Neumann and Gunderson was not sufficient to disqualify Justice Gunderson, even if it continued in existence and became a working business, and

cited In Re Drexel Burnham Lambert, Inc., 861 F.2d 1307 (2d Cir. 1988), as authority to show that Gunderson should not be disqualified:

> In In Re Drexel Burnham Lambert, Inc., 861 F. 2d 1307 (2nd Cir. 1988), the United States Court of Appeals was presented with a petition for a writ of mandamus seeking disqualification of Senior U.S. District Judge Milton Pollack from presiding over certain civil fraud actions arising from claims of illegal insider trading. This arose from the much publicized "Ivan Boesky Insider Trading Scandal."
>
> The SEC had instituted a civil fraud action against the brokerage house of Drexel Burnham and Ivan Boesky, which was assigned to Judge Pollack.
> In June 1988 while the Boesky Litigation against Drexel was in full swing, Judge Pollack's wife, Moselle Pollack and certain members of her family, entered into a leverage buyout (LBO) transaction agreement, by which Mrs. Pollack's family business in Texas would be sold, and which would result in Judge Pollack's spouse receiving thirty million dollars ($30 Million).
>
> The defendant in the Boesky Litigation, Drexel Burnham brokers, were the underwriters of the deal by which Mrs.

Pollack's family business was to be sold in the LBO.

Immediately, when the attorneys for defendant Drexel Burnham Lambert learned of the $30 million dollar transaction involving Judge Pollack's wife, they notified Judge Pollack and promptly brought a motion asking Judge Pollack to recuse himself from the case.

From the refusal of Judge Pollack to recuse himself, defendant's attorneys brought a petition for a writ against him, asking the Second Circuit Court of Appeals to recuse him. Drexel's basis for the writ was 28 U.S.C. Sec. 455, providing that:

"(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning [sic] a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a

financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

Defendant Drexel, Burnham relied upon the recent holding of the United States Supreme Court in Liljeberg v. Health Services Acquisition Corp., ___ U.S. ___, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), holding that a trial judge who served as a trustee of a university that had a direct stake in the litigation should have recused himself.

The Court of Appeals denied Drexel's petition for writ, holding that there was no appearance of impropriety in Judge Pollack trying the Ivan Boesky Litigation, since none of Drexel's money was being paid to Mrs. Pollack, and Drexel was not indispensable to Mrs. Pollack's transaction, and there was no nexus between the lawsuits being tried by Judge Pollack and Mrs. Pollack's interest in the family business being sold and brokered by Drexel.

As the Court of Appeals stated:

"Consequently, Judge Pollack's connection is too remote to mandate recusal because Drexel has no obligation direct or indirect to Mrs. Pollack. To adopt petitioner's theory would mean that any remote

> connection even, for example, to investors who buy SHI bonds from Drexel would mandate recusal. Thus, the price of avoiding any hint of impropriety, no matter how evanescent, would grant litigants the power to veto the assignment of judges. In our view, petitioners' theory would carry a worthy policy too far." 861 F.2d 1307, at 1315.
> The Court further stated that "where an interest is not direct, but is remote, contingent, or speculative, it is not the kind of interest which reasonably brings into question a judge's impartiality. See In re Placid Oil Co., 802 F.2d 783, 787 (5th Cir.), req'q denied 805 F.2d 1030 (1986). Cf. Mavis v. Commercial Carriers, 408 F.Supp. 55 (C.D. Cal.1975) (district court cannot be disqualified because of ownership of stock in a non-party oil company because of a remote subsidiary of a corporation with which the oil company had engaged in joint venturers was aparty (sic) in a proceeding before it." 861 F.2d at 1313-1314.

Appellant Ainsworth's Responses to Combined's Supplement to its Motions for Disqualification and for Evidentiary Hearing and Request for Submission of All Pending Matters at 6-9, 105 Nev. 237, 774 P.2d 1003 (1989) (No. 17625).

Justice Rose wholeheartedly agrees with the points and authorities and assertions made by Peter Neumann in the

Ainsworth case that any indirect, remote, or speculative interest in a business does not disqualify a judge or justice. Justice Rose's ownership of a bar that had already been sold at the time the decision was rendered in this case is, at very best, remote, indirect, and speculative as to this litigation.

Further, Neumann asserted in Ainsworth's points and authorities that Combined and the world had constructive notice of the fact that Lupe Gunderson and Neumann were jointly involved in a business venture by the filing of a written application to Washington, D.C., with the Federal Communication Commission and a legal notice in the Reno Gazette-Journal. Peter Neumann asserted that his affidavit filed in that case established the following:

> In brief, this affidavit gives proof that in 1985, the year before the Ainsworth v. Combined jury trial, there was a short-lived attempt by Neumann and five other Nevadans to obtain an FCC television permit for Reno for a newly formed corporation called Peavine, Inc.; that one of those five persons was Guadulupe [sic] Gunderson; that the Peavine, Inc. began in May, 1985 and terminated in November, 1985; that no money changed hands; that no stock was ever issued; that Mrs. Gunderson attended no more than two meetings of the principals; and that Justice Gunderson attended none, and never discussed Peavine, Inc. with Neumann.

> Further, the affidavit shows, beyond a reasonable doubt, that the Peavine, Inc. Application to the FCC, which included both the names of Peter Chase Neumann and Guadalupe Gunderson, was a matter of public record.
>
> First, the FCC application was filed publically [sic], in Washington, D.C. and is a matter of public record.
> Second, Peavine, Inc., through Mr. Neumann, caused Notice of the filing of the FCC application to be published in the Reno Gazette Journal newspapers, during the month of [sic] 1985.

Appellant Ainsworth's Response to Combined's Supplement to its Motions for Disqualification and for Evidentiary Hearing and Request for Submission of All Pending Matters at 4-5, Ainsworth (No. 17625).

If filing an application in Washington, D.C., and publishing it in the legal notices in the Reno Gazette-Journal provide constructive knowledge of a business interest as Peter Neumann asserted, then the many liquor and gaming licenses issued to Justice Rose by Clark County and the State of Nevada, the continual newspaper articles about Justice Rose's bar ownership, Justice Rose's annual judicial disclosure statements filed from 1987 to the present, and the enormous publicity of his bar ownership in Justice Rose's 1994 campaign for reelection clearly gave the drunk driver's estate and its attorneys constructive notice that Rose owned a bar in

Southern Nevada. Further, the attorney for the drunk driver's estate had actual knowledge of the bar ownership prior to the decision in November, 1994, as is established by the affidavit of Clark Santini attached to these points and authorities.

II

THE MOTION TO DISQUALIFY UTTERLY FAILS TO ESTABLISH FRAUD OR ILLEGAL CONDUCT AS REQUIRED BY RULE 35 OF THE NEVADA RULES OF APPELLATE PROCEDURE

NRAP 35 specifically states that once a justice has participated in a contested matter, he or she may be removed only for fraud or illegal conduct.

> In no event will the supreme court deem timely any motion or charge seeking the disqualification or recusal of a justice who has heard argument upon, or otherwise considered, any contested matter in the cause, except as to grounds based on fraud or like illegal conduct of which the challenging party had no notice until after the contested matter was considered.

NRAP 35(a). Justice Rose was part of the majority decision in this Viani case that was filed on November 30, 1994, the case having been pending in the Nevada Supreme Court for more than one year.

The affidavit of Justice Rose clearly establishes that his ownership of a bar in Las Vegas, Nevada, was common knowledge throughout Nevada, that the drunk driver's estate and its attorney had actual and/or constructive knowledge of this fact, that he had already sold the bar and any impact of a decision favoring the estate would have no effect on him, and that he truly believed that he had an obligation pursuant to Nevada law to sit on the case. There was absolutely no fraud, deceit, or illegal conduct by Justice Rose. Therefore, the drunk driver's estate fails to make even a prima facia case for disqualification of a justice after a contested matter or decision has been rendered.

III

THIS IS NOT A GAMING CASE

This case involves a bar serving liquor to a minor and the subsequent automobile accident. It has nothing to do with legalized gaming. Yet, the drunk driver's estate continually asserts that this is a gaming case and has included a list of cases claimed by the drunk driver's estate to be gaming related that Justice Rose did not participate in and also lists contributions received by Justice Rose from hotels and casinos. Since it is obvious that this is not a gaming case, the inclusion of this material can only be meant to embarrass or injure Justice Rose.

But, even assuming that some sort of gaming was involved in this case, Justice Rose had no legal obligation to disqualify himself because he has a restricted gaming license.

Even a preliminary investigation by the drunk driver's estate would have discovered this fact.

As a state employee, Justice Rose must receive a waiver from the Nevada Gaming Control Board and Commission to hold a gaming license. This is called a Regulation 11 waiver, and Regulation 11 of the Nevada Gaming Regulations requires all employees of the State of Nevada to secure such a waiver in order to hold a gaming license. Justice Rose has had such a waiver since 1987, and it requires him not to participate in any cases that are "gaming related."

The term "gaming related" has been defined by the Gaming Control Board and Commission as any case involving the Gaming Control Board or Commission, or its employees acting in their official capacity, or deals with the enforcement of interpretation of gaming statutes contained in NRS Chapters 463-466, or gaming regulations. This requirement does not mandate that Justice Rose disqualify himself in every case involving hotel-casinos or gaming unless it falls within the above definition. Justice Rose disqualifies himself from ten cases or less each year because they are "gaming related," out of about 1,000 decided by the Nevada Supreme Court.

The drunk driver's estate has completely misinterpreted and expanded the meaning of "gaming related" cases. Further, many cases that it claims are "gaming related" do not even deal with a gaming issue or an establishment where gaming is conducted, as pointed out by the affidavit of Justice Rose, The most glaring example is

the case brought by the Nevada State Employee's Association against the state to enforce a pay raise. Justice Rose recused himself because his wife is a state employee and it might appear as if he were voting on her compensation. The drunk driver's estate states that Justice Rose disqualified himself because this was a gaming related case. This claim is completely false.

IV

SANCTIONS SHOULD BE IMPOSED

Nevada law permits this court to impose sanctions on any party or attorney who files a frivolous pleading or one that is meant to embarrass or injure a justice or the court itself. Rule 35(e).

In this case, the drunk driver's estate and its attorney have committed the following serious violations:

1. Filed what appears to be the false affidavit of attorney Ken McKenna.

2. Made false or recklessly inaccurate statements such as this being a gaming case or that several cases in which Justice Rose participated were gaming related.

3. Filed this motion with the purpose to embarrass/injure Justice Rose. This is evidenced by the false and recklessly inaccurate statements made in the motion as well as the substantial efforts to publicize the filing of this motion and cast Justice Rose in an unfavorable light. The drunk driver's estate and its attorney took great efforts to

distribute its motion and made a media circus out of its filing. The attorney for the drunk driver's estate is also carrying his political opposition into the legal arena. As set forth in Justice Rose's affidavit, Peter Neumann campaigned actively against Justice Rose because of Justice Rose's past stand of refusing to enact a dram shop law by judicial activism. He has now carried that political opposition into the courts in his representation of the drunk driver's estate.

4. The motion to disqualify totally fails to present any facts that would establish fraud on the part of Justice Rose. As was previously discussed, this is required by NRAP 35 and the motion to disqualify is completely void of any such showing.

CONCLUSION

Therefore, Justice Rose respectfully requests that the motion to disqualify him in this case be denied, that Justice Springer not participate in the decision on this motion, and that the appropriate sanctions be imposed on the drunk driver's estate and its attorney.

DATED this 8th day of March, 1995.

s/s Robert E. Rose

AFFIDAVIT

STATE OF NEVADA

CARSON CITY

COMES NOW, Robert E. Rose, and being duly sworn, deposes and says:

My Bar Ownership and its Sale.

I have had an ownership interest in Sidelines, Inc. since 1982, and this corporation has been the owner and operator of sports bars and lounges in Las Vegas since that time. Since 1982, Sidelines, Inc. and I have held a liquor license from Clark County and/or Henderson that has been renewed each year, a copy of the latest license from Henderson, Nevada, is attached to this affidavit as Exhibit 1. Sidelines, Inc. and I have also held a restricted gaming license from the State of Nevada from that time until the present, this being clearly evidenced by Exhibit D of the motion to disqualify. It has been a matter of public record in the State of Nevada and Clark County that I have both a liquor and gaming license and have operated a sports bar in Las Vegas for more than the past ten years.

The bar and corporation that owns it (Sidelines, Inc.) were sold by me on July 11, 1994, as is reflected in Exhibit B of the motion to disqualify. The Gaming Control Board and Commission have both approved the sale, the new owners are on the premises and beginning to take control, and the final sale will be consummated this month (March, 1995). Any change in the law concerning the liability of bars

in Nevada will not affect me because I no longer own a bar. Further, I protect myself against any personal liability from the bar operation by having it run by a corporate entity and I carry substantial liability insurance.

Extensive Public Broadcasts of Bar Ownership.

I ran for the Nevada Supreme Court in the 1988 general election. My opponent was fellow District Court Judge Myron Leavitt, and my ownership of a bar in Las Vegas, through that corporation known as Sidelines, Inc., was an issue in the campaign. I am attaching as Exhibit 2 newspaper articles concerning this race and my bar ownership that appeared in 1988.

Ownership of a bar in Las Vegas has been mentioned periodically from that time to the present. In fact, a recent article about the sale of my bar in Las Vegas observed that my bar ownership has been a continual public issue from the 1988 campaign to the present time. A copy of that article is attached as Exhibit 3.

I ran for re-election to the Nevada Supreme Court in the 1994 general election. District Judge Myron Leavitt again filed against me in March, 1994. His two major attacks against me were that I attempted to influence the prosecution of my former law clerk on marijuana charges by speaking to Clark County District Attorney Rex Bell and that I owned a bar (lounge or tavern) in Las Vegas. Numerous newspaper articles appeared about my ownership of a bar in Nevada papers throughout the campaign. Couples of a

sampling of such articles are attached as Exhibit 4, along with the date of publication and newspaper.

In addition to newspaper coverage, Leavitt's campaign hit hard on the fact that I owned a bar and mentioned it in several television and radio commercials. Attached as Exhibit 5 are the scripts from radio and television commercials that were run extensively the last month of the campaign (last three weeks on October and first week in November). From my viewing and monitoring these commercials, they ran most of the last month of the campaign in the Reno and Las Vegas markets on a number of radio stations and all three major television networks about seven to ten times per day.

Since Leavitt was making such a negative issue out of my bar ownership, my bar manager thought a positive letter to fellow licensed liquor/gaming establishments would help balance the negative publicity. He prepared the letter attached as Exhibit B to the motion to disqualify me, showed it to my campaign manager, and then distributed it to many gaming/liquor licensees in Southern Nevada.

Shortly thereafter, Leavitt's campaign strongly criticized me for the letter and was able to mobilize individuals and groups against drunk drivers. A number of television news stories were run in Las Vegas and Reno about a candlelight vigil that these individuals and the Leavitt campaign conducted in front of my campaign office in Las Vegas during the first week of November, 1994, as well as newspaper articles about this protest. A copy of a newspaper article is attached as Exhibit 6. Leavitt also ran a desperation

radio ad in Reno, Carson City, and Las Vegas that strongly criticized me for owning a bar, and the radio commercial began by saying that drunk drivers have a special friend in Bob Rose because he owns a tavern in Las Vegas. This false commercial ran seven to ten times a day on many stations in the Las Vegas and the Reno-Carson City areas. A copy of the full text of this radio commercial is attached as Exhibit 7.

I won the November 8, 1994 general election. On November 30, 1994, this case, Snyder v. Viani, came up for final consideration, and no request or motion to disqualify me had been filed. For reasons stated in this affidavit, I truly believed that there was no reason why I should disqualify myself from this case. Further, I believed that everyone in the state knew I owned a bar in Las Vegas, and a motion or request for disqualification would have been made if either party opposed my sitting on this case.

The Viani Decision.

I believed the vote on this case would be 4-1, with Justice Steffen dissenting. However, Justice Springer switched his vote from his long-standing position, and I was very surprised by this change. Justice Springer had always insisted that any liability to be imposed on a purveyor of alcohol should be imposed by the Legislature and not by this court, and had voted this way on a number of cases. See Hinegardner v. Marcor Resorts, 108 Nev. 1091, 844 P.2d 800 (1992); Yoscovitch v. Wasson, 98 Nev. 250, 645 P.2d 975 (1982); Bell v. Alpha Tau Omega, 98 Nev. 109, 642 P.2d 161 (1982) (decision authored by Justice Springer holding

that violation of criminal statute prohibiting sale of alcoholic beverages to persons under the age of twenty-one does not constitute negligence per se). Justice Springer's switched vote made the case much closer (3-2 instead of 4-1) and my vote much more significant since only a bare majority supported the decision.

No justice on the Supreme Court has raised the point of whether I should be participating in this case because I owned a bar in Clark County. Every judge has an obligation to speak out if he believes something improper is being done by a fellow judge. Canon 3(D)(1). All of the other justices knew I owned a bar in Las Vegas before the opinion was signed, yet no one expressed any concern or cautioned me about participating in the case. This is not to criticize any of them in any way. It is simply further evidence that I had no conflict of interest and that none of my fellow justices thought it would be improper for me to vote at that time.

Regarding Peter Neumann.

I have known Peter Neumann for many years. He has practiced almost exclusively as a civil trial attorney and has been active in the American and Nevada Trial Lawyers Associations. In 1988 when I was running for the Nevada Supreme Court, I met with Peter Neumann and asked for his assistance. During our conversation, he indicated that although his very close friendship with then Justice Elmer Gunderson was trying at times and he found Gunderson occasionally overbearing, he had remained a close friend and had helped him in several of his campaigns. He specifically indicated that he had been a campaign manger on

Gunderson's first campaign and had assisted him in that and other campaigns by putting up signs and flying him in an airplane to various political events throughout the state.

As previously explained, Exhibit B of the motion to disqualify was sent by my bar manager to many taverns and hotels in Southern Nevada. Peter Neumann received a copy of this letter almost immediately. Since Elmer Gunderson's very close friend and attorney Laura FitzSimmons was actively working on the Leavitt campaign, I can only assume that the information concerning the letter was forwarded by her and the Leavitt campaign to Neumann. I have been informed that Laura FitzSimmons was working full time on Leavitt's campaign the last week of the campaign and answering the telephone at the Leavitt headquarters.

The letter, among other things, cited my longstanding legal position that the dram shop act or law should not be enacted by the judicial activism of this court, but rather left to the Legislature. The letter also stated that I believe "in strong but fair DUI enforcement," which is absolutely true.

Apparently, adamantly disagreeing with my legal stand, Neumann began faxing copies of the letter and other information to trial attorneys in Washoe County. Perhaps he even called or faxed Ken McKenna with this information.

Peter Neumann has indicated that he will not accept a fee for representing the drunk driver's estate. This is a realistic position to take because any recovery by the drunk driver's estate is speculative and in all probability will not occur even if the law is changed by this court. It is doubtful

that a jury or judge will want to compensate a drunk driver who killed four innocent people. I am informed and believe, and on information and belief state, that the life insurance policy insuring the drunk driver has already paid the drunk driver's estate the $300,000 policy limits.

Since money is not Peter Neumann's motive for filing this case, I believe he is doing it for two reasons. First, he would like to establish the dram shop law by judicial decision rather than by legislative action. This would give the trial attorneys yet another basis to file lawsuits against business establishments. If the dram shop act were established for minors by judicial activism, I cannot see how we could not logically extend it to cover all people in the next case dealing with an adult. The drunk driver was three months shy of twenty-one years when he died. Once this has been established, it is a small step, indeed, to hold any host who serves alcoholic beverages liable for the action or injury caused by his guest. This would mean that anyone serving alcoholic beverages in their home could be liable for damages caused by people to whom they have served alcoholic beverages. This has been done by court decision in several states. See McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 146 (Mass. 1986); Kelly v. Gwinnell, 476 A.2d 1219, 1224 (N.J. 1984) (subsequently overturned by statute); Solberg v. Johnson, 760 P.2d 867, 870-71 (Or. 1988). My personal legal view is that any enactment of a dram shop law should be done by the Legislature and not by the judicial activism of this court.

The second reason I believe Peter Neumann filed this motion to disqualify me is that it assists in embarrassing or

disparaging me, something that his close confidant Elmer Gunderson has been working actively to do for the past year. When you consider what appears to be a false affidavit, the false and recklessly inaccurate statements made in the motion to disqualify, the inclusion of gaming in the motion to disqualify when this case has nothing to do with gaming, and the media circus surrounding the filing of the motion to disqualify, it is obvious that the drunk driver's estate and its attorney wanted to promote the greatest negative press for me when the motion to disqualify was filed.

This is a Case Involving Alcoholic Beverages, Not Gaming.

The drunk driver's estate is attempting to establish a cause of action to sue an establishment that served the drunk driver alcoholic beverages five hours before the tragic accident, even though the drunk driver spent the five hours drinking at another bar immediately prior to the accident. While purveyors of alcoholic beverages in Nevada often have legal gaming (usually slot machines) on the premises, this case concerns the sale of alcoholic beverages and has nothing to do with gaming or gaming licenses. I have no legal disqualification from sitting on any case involving alcoholic beverages because of a liquor license issued to a company I own in Clark County, Nevada. The issue of gaming and my asserted disqualification because I have a restricted gaming license is a red herring and has been included in the motion to disqualify me solely to injure and embarrass since it obviously has nothing to do with the case at hand.

Even if this is considered a gaming case, which I emphatically state it is not, I would not be in any way

disqualified from it. When a state employee desires to hold a gaming license in the State of Nevada, the employee must file for permission pursuant to Regulation 11 of the gaming regulations of Nevada--this permission is commonly called a Regulation 11 waiver. Upon becoming a judge in 1986, I applied for a Regulation 11 waiver, was granted it, and have held such waiver to the present time.

The Regulation 11 waiver granted to me requires that I not participate in any gaming related cases. Gaming related cases are defined as cases that involve the Nevada Gaming Control Board or Commission, or its employees acting in their official capacity, or deals with the enforcement of interpretation of the gaming laws contained in Chapters 463-466 of the Nevada Revised Statutes or the regulations promulgated by the Nevada Gaming Commission. This is a narrow definition of the term "gaming related" and does not require me to disqualify myself in many cases involving establishments where gaming is conducted. Each year, I disqualify myself in ten cases or less out of more than 1,000 we decide because they are gaming related as above defined.

In Exhibit E attached to the motion to disqualify me, a number of cases are listed where I did not participate and an asterisk is placed after cases that the drunk driver's estate alleges are gaming related decisions. This indication is erroneous and/or misleading in many cases. As examples, I did not participate in many cases claimed to be gaming related for the following reasons:

> Craigo v. Circus-Circus Enterprises, 106 Nev. 1, 786 P.2d 22 (1990)--this case was argued

and submitted to the court before I became a Justice in January, 1989. I was not asked to participate by the other Justices. This is the same reason why I did not participate in the case of 4 Queens v. Employment Security Dep't, 105 Nev. 53, 769 P.2d 49 (1989), and Nova Horizon v. City Council, Reno, 105 Nev. 92, 769 P.2d 721 (1989). Further, the Craigo case was not gaming related. It involved the alleged failure of Circus-Circus to adequately provide security and surveillance in its parking garage.

S.N.E.A. v. Daines, 108 Nev. 15, 824 P.2d 276 (1992)--this was a case involving a state employees' association suing the state to compel the Governor and the state to give a raise to state employees as they claim was authorized by the Legislature. I disqualified myself because my wife is a state employee, and it might appear as if I were voting on her raise. Claiming this case was a gaming related case is ridiculous.

Hilton Hotels v. Butch Lewis Productions, 109 Nev. 1043, 862 P.2d 1207 (1993), and Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 808 P.2d 919 (1991)--I disqualified myself in these cases because the firm that represents the company I own and me is Schreck, Jones, Bernhard, Woloson & Godfrey, and they were counsel in these cases.

> I was not required to be disqualified because of the Regulation 11 waiver. These cases dealt with an alleged breach of contract between a hotel and a boxing promoter.
>
> Sands Regent v. Valgardson, 105 Nev. 436, 777 P.2d 898 (1989)--this was not a gaming related case. It involved a suit by an employee who claimed that she was improperly fired by the Sands Regent Hotel. I disqualified myself for an unrelated reason.

Gaming Contributions to 1994 Campaign Contained Only to Injure/Embarrass.

As above stated, this is not a gaming case, but one involving the sale of alcoholic beverages. In spite of that, Peter Neumann has included all of my campaign contributions and expense reports filed by me in 1994 concerning my race for re-election to the Nevada Supreme Court. Since this has nothing to do with the parties in this case, or the cause of action the drunk driver's estate is attempting to establish, I can assume only that it was included to embarrass or injure me. Exhibit A is not relevant to this case and should be completely disregarded in deciding this disqualification motion. Anyone who runs for public office on a statewide basis in Nevada almost always receives most of his or her campaign assistance and contributions from the gaming/entertainment industry. For example, in the 1994 election, the Governor received more than $1,000,000 from this source.

Media Circus.

Great efforts were taken to insure that the motion to disqualify got the maximum media coverage. Prior to the motion being filed on February 1, 1995, my office was called by Las Vegas Sun reporter Cy Ryan asking for a reaction to the motion. Channel 4 in Reno, the Sunbelt Broadcasting Company's station whose president is James Rogers, would follow later in the day with calls about the motion, as would several other reporters.

After the motion to disqualify was delivered to the clerk's office at the Nevada Supreme Court, it was delayed more than an hour in filing. Since many copies of the motion to disqualify that contained false or recklessly inaccurate statements, or the motion's allegations, had been widely distributed to the press, the delay in filing was of special concern to Peter Neumann because he could not claim any immunity because the inaccurate allegations were contained in a filed court document. I was informed by the clerk's office, and on information and belief state, that Peter Neumann called the clerk's office in excess of a dozen times, including asking to speak to the clerk of the court personally, to insist that the motion be filed immediately. Neumann's action is more evidence that a substantial media effort had been put forth surrounding the filing of this motion to disqualify.

Former Justice Elmer Gunderson serves as the counsel to the Las Vegas Sun (Greenspun Inc.), and he is a personal friend of Jim Rogers, an officer and substantial shareholder in Sunbelt Broadcasting that owns Channel 3 in Las Vegas

and Channel 4 in Reno. Gunderson has considerable influence with both the Las Vegas Sun and Sunbelt Broadcasting, and I have seen him get articles printed or broadcasts made concerning projects in which he was interested in the Las Vegas Sun and on Sunbelt Broadcasting television. The Las Vegas Sun ran a front page story about this motion to disqualify, and Channel 4 ran a news story on the evening news. Both were not complimentary to me. The Las Vegas Sun and Sunbelt Broadcasting are a very important part of Gunderson's arsenal of persuasion.

In contrast, after the Nevada Supreme Court's decision in PETA v. Bobby Berosini, Ltd., 110 Nev. 78, 867 P.2d 1121 (1994), on January 27, 1994, a motion to disqualify Judge Lehman was filed because he was on the advisory board for an animal rights organization. Judge Lehman was appointed to participate in that case when I voluntarily recused myself. Although an important case and motion, there was almost no media coverage about it. Why? The answer is because in this case the attorneys for the drunk driver's estate widely disseminated the motion and promoted news coverage, and in the PETA case, that was not done. In a recent article concerning this case that appeared in the Reno News & Review, the author described Peter Neumann as "the tough-minded and media savvy." He is certainly "media savvy."

The above information has led me to conclude that Peter Neumann widely disseminated the motion to disqualify me or its allegations in an attempt to get the widest possible coverage for his position and to criticize and embarrass me.

Victory by Motion to Disqualify.

The number of motions to disqualify a justice has increased dramatically in the last few years, and most of these motions have been filed against me by attorneys who are extremely close to former Justice Elmer Gunderson. These attorneys include Vivian Lynch, Laura FitzSimmons, and now Peter Neumann.

In addition to being, in my judgment, a vehicle to criticize and embarrass me, these motions to disqualify have been successful in accomplishing a result that normally would not be achieved by the five elected justices sitting on the case. In the Whitehead v. The Nevada Judicial Discipline Commission case, the final result with two substitute judges participating was, in all probability, contrary to what the decision would have been if the five elected justices had participated in the decision. In this case, the final result may be opposite to our November 30, 1994 decision if I am disqualified. Since Justice Steffen is now Chief Justice, he will be able to appoint my replacement. Since he authored the dissent, it is probable that he will appoint a substitute who he believes will favor his view in this case, specifically that a dram shop law should be enacted by this court when alcoholic beverages are sold to a minor.

In a very real way, the motion to disqualify has not only been used to criticize or embarrass me, but also as a vehicle to achieve a result that ordinarily would not be achieved, or in this case, that was not achieved.

Annual Judicial Disclosure Included Bar Business.

A judge or justice in the State of Nevada is required to file a judicial disclosure statement by April 30 of each year. As a judge and then as a justice I have filed these annual statements from 1987 to the present. In these statements, I have repeatedly identified my ownership of the corporate entity Sidelines, Inc., and in many of these disclosure statements I have indicated that it is a lounge or sports lounge. Anyone who would review my financial disclosure statements would find out that I own a corporation known as Sidelines, Inc. that does business in Clark County, Nevada, as a lounge. Relevant copies of those forms filed from 1987 to the present are attached to this response as Exhibit 8.

Justice Springer Should be Disqualified from Voting on this Motion.

Justice Springer and I have had a number of clashes at the Nevada Supreme Court during the past two years. From these confrontations have come a healthy dislike one for the other. The facts of these clashes and the part played by former Justice Elmer Gunderson in these disputes will be set forth by me in a supplemental response. Justice Springer recently blamed me for much of the bad media coverage concerning the Whitehead v. The Nevada Judicial Discipline Commission case, this personal criticism being set forth in Whitehead v. Comm'n on Jud. Discipline, 111 Nev. ___,

___, ___ P.2d ___, ___ (Adv. Op. No. 11, February 24, 1995). In fairness to the parties and me, it is requested that Justice Springer not participate in the decision of this motion to disqualify.

s/s Robert E. Rose

Subscribed and Sworn to before me
this 8th day of March, 1995.

s/sVickie Roberts
Notary Public

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWNA SNYDER,

Appellant,

vs.

JOSEPH VIANI, INDIVIDUALLY AND D/B/A JOE'S TAVERN; Et. Al,

Respondents.

No. 23726

FILED JUN 30 1995
Janette M. Bloom
Clerk of Supreme Court
By s/s Janette M. Bloom
Deputy Clerk

SHAWNA SNYDER'S SUPPLEMENT TO MOTION TO DISQUALIFY JUSTICE ROSE, TO WITHDRAW THE COURT'S OPINION AND TO REARGUE THE APPEAL ON ITS MERITS

COMES NOW appellant, SHAWNA SNYDER, as Special Administratrix of the Estate of Daniel Patrick Lovett, Decedent, by her attorney, Peter Chase Neumann, and hereby supplements her Motion to Disqualify Justice Rose, to Withdraw the Court's Opinion, and to Reargue the Appeal on its Merits.

This supplement is necessary because, since the filing of SHAWNA SNYDER's original motion, Justice Rose has engaged in further violations of the Nevada Code of Judicial Conduct. Justice Rose's most recent judicial misconduct has resulted in new, additional grounds which disqualify him from any further participation in these proceedings.

SHAWNA SNYDER's supplement is made upon the grounds set forth in the accompanying memorandum of points and authorities.

DATED this 14th day of February, 1995.

s/s Peter Chase Neumann
Peter Chase Neumann
Post Office Box 1170
Reno, Nevada 89504
(702) 786-3750
Attorney for Appellant

MEMORANDUM OF SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISQUALIFY JUSTICE ROSE, TO WITHDRAW THE COURT'S OPINION, AND TO REARGUE THE APPEAL ON ITS MERITS

I. SUPPLEMENTAL STATEMENT OF FACTS

On February 1, 1995, SHAWNA SNYDER filed her Motion to Disqualify Justice Rose, to Withdraw the Court's Opinion, and to Reargue the Appeal on its Merits. On the very same day, Justice Rose disseminated a 'press release', entitled "STATEMENT OF JUSTICE ROSE IN RESPONSE TO MOTION". A true copy of the press release is attached hereto as Exhibit A. This press release was prepared on stationary with a letterhead that reads: "Supreme Court of Nevada, Robert E. Rose, Justice" and which bears this Court's official seal.

The Affidavit of Peter Chase Neumann establishes that he was provided a copy of the press release by a prominent member of the newspaper industry. Exhibit B. Additionally, the press release has been frequently quoted in various news stories reporting on these proceedings. On February 2, 1995, the press release was extensively quoted in the Las Vegas Sun. A copy of the story, bearing the headline, "Rose denies he had a conflict in tavern-liability case," is attached hereto as Exhibit C. On the same date, Justice Rose's press release was quoted in a story printed in the Las Vegas Review-Journal. A copy of this story, headlined, "Woman seeks new hearing," is attached hereto as Exhibit D.

On the following day, February 3, 1995, the Las Vegas Sun ran another story in which Justice Rose's press release was quoted. The story focuses upon Justice Rose's contention, set forth in the press release, that SHAWNA SNYDER's motion is merely an attempt to discredit him and that it is in some way attributable to certain Nevada attorneys whom Justice Rose perceives as his political enemies. The story is attached hereto as Exhibit E. Again on February 3, 1995, a similar story making direct reference to the content of Justice Rose's press release was published in the Nevada Appeal. Exhibit F.

On February 4, 1995, Justice Rose's public comments were again quoted in a newspaper story. The Reno Gazette-Journal printed a story containing the following headline: "Conflict alleged against Nevada high court's Rose." A copy of this article is attached hereto as Exhibit G.

Finally, on February 8, 1995, the Reno Gazette-Journal ran an editorial bearing the following headline: "Rose should have excused himself from case." Once again, this article, attached as Exhibit H, made extensive reference to the content of Justice Rose's press release.

As the Court is presumably aware, the same press release also received extensive attention from the broadcast media. From all of the foregoing, the inescapable conclusion to be drawn is that Justice Rose widely disseminated his press release to all branches of the media.

Portions of the content of Justice Rose's press release warrant particular attention. The first paragraph is clearly a public comment on the merits of SHAWNA SNYDER's motion. Justice Rose states an opinion that he has no conflict of interest because, he contends, the decision has no impact on him.[1] In the second paragraph, Justice Rose states that he sold his bar in July of 1994, yet, in the same sentence, he acknowledges that the sale has not yet been consummated.

The third and fourth paragraphs of Justice Rose's press release are particularly troubling. In them, Justice Rose basically accuses SHAWNA SNYDER of 'sand-bagging.' He asserts that she should have made her motion prior to the submission of the case to the Court in April of 1993 or, in any event, prior to the November, 1994 disposition. Justice Rose states that SHAWNA SNYDER "waited to see the decision, did not like it, and now [is] trying to get a different result by attempting to disqualify me." In support of his claim that SHAWNA SNYDER's motion to disqualify is brought in bad faith, Justice Rose extravagantly states: "Everyone in the State knows I own a bar-restaurant in Las Vegas .."[2] The fifth paragraph of Justice Rose's press

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[1] "I own a car, yet participate in many cases involving automobiles and traffic laws. This is because those cases have no direct and substantial effect on me personally, as is the situation in this present case."

[2] Not everybody knew this fact. Not only did Shawna Snyder not know, as her sworn affidavit demonstrates. But as the affidavit of Peter Chase Neumann points out, numerous attorneys have stated to him that they did not know that Rose owned a tavern.

release attempts to characterize SHAWNA SNYDER as a participant in a political conspiracy to discredit Justice Rose. This paragraph does not warrant further comment.

II. ARGUMENT

JUSTICE ROSE'S PUBLIC COMMENT ON A PENDING CASE CONSTITUTES JUDICIAL MISCONDUCT AND HAS RESULTED IN ADDITIONAL GROUNDS FOR HIS DISQUALIFICATION TO PARTICIPATE FURTHER IN THESE PROCEEDINGS

A. JUSTICE ROSE VIOLATED CANON 2(B) OF THE NEVADA CODE OF JUDICIAL CONDUCT BY PREPARING HIS PRESS RELEASE ON HIS JUDICIAL LETTERHEAD, BEARING THE NAME OF THE SUPREME COURT OF NEVADA AND THE SUPREME COURT'S OFFICIAL SEAL

The first point which SHAWNA SNYDER wishes to make concerning Justice Rose's improper press release, is that it was prepared on judicial letterhead--which contains the name of the Supreme Court of Nevada, and which also bears the Court's official seal. Canon 2B provides, in relevant part, as follows:

Canon 2.

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

. . ..

B. . . .. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others .

. ..

The Commentary to this Canon explicitly states as follows: "[J]udicial letterhead must not be used for conducting a judge's personal business." (Emphasis added.) Certainly it cannot be contended that Justice Rose was acting in any judicial capacity when he disseminated his press release to the news media. Justice Rose was not acting as a representative of this Court, nor was he carrying out a Court function. Rather, Justice Rose was clearly furthering his own private interest in obtaining positive publicity and, ultimately, his own private interest in preserving the insulation from liability that he has created for himself and for his fellow saloon owners, as a result of his votes on this case and on Hinegardner v. Marcor Resorts, 108 Nev. 1091, 844 P.2d 800 (1992).

By preparing his press release on the official letterhead of this Court, Justice Rose was lending the prestige of his judicial office and, more importantly, the prestige of this Court to his private purposes. This clear violation of Canon 2B evinces bias and prejudice on the part of Justice Rose, which disqualifies him from further participation in these proceedings. If nothing else, Justice Rose's judicial misconduct creates a disqualifying appearance of impropriety.

B. JUSTICE ROSE'S PUBLIC COMMENT UPON A PENDING CASE IS A VIOLATION OF CANON 3B(9) OF THE NEVADA CODE OF JUDICIAL CONDUCT

Canon 3B(9) of the Nevada Code of Judicial Conduct provides as follows:

> Canon 3.
> A judge shall perform the duties of judicial office impartially and diligently.
>
> . . ..
>
> B. Adjudicative Responsibilities.
>
> . . ..
>
> (9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect the outcome or impair the fairness or make any non-public comment that might substantially interfere with a fair trial or zhearing.

In Goldman v. Nevada Comm'n on Judicial Discipline, 108 Nev. 251, 297, 830 P.2d 107 (1992), this Court affirmed the imposition of a sanction against a former district court judge based, in part, upon a determination by the Nevada Commission on Judicial Discipline that Judge Goldman had violated the former version of Canon 3B(9) (then, Canon 3A(6)) by contacting the news media concerning a case pending in his court. See Cunningham v. District Court, 102 Nev. 551, 729 P.2d 1328 (1986). Similarly, in Matter of Sheffield, 465 So.2d 350 (Ala. 1984), the Supreme Court of Alabama upheld a judge's two-months' suspension without pay because he discussed a pending case with a newspaper reporter and failed to disqualify himself

under circumstances in which his impartiality might reasonably be questioned. While not every violation of the public comment restriction constitutes grounds for disqualification, disqualification is required
where the content of the public comment gives rise to an appearance of impropriety. See generally Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988).

C. THE CONTENT OF JUSTICE ROSE'S IMPROPER PUBLIC COMMENTS EVIDENCES A DISQUALIFYING BIAS OR, AT A MINIMUM, CREATES AN APPEARANCE OF IMPROPRIETY WHICH DISQUALIFIES HIM FROM FURTHER PARTICIPATION IN THESE PROCEEDINGS

SHAWNA SNYDER will not attempt to address each and every point raised in Justice Rose's press release. This is not the purpose of this supplement to her motion. The content of the press release will only be examined insofar as it bears upon new grounds for Justice Rose's disqualification in these proceedings.

The most striking feature of the press release's content, in this regard, is that it essentially accuses SHAWNA SNYDER of committing perjury in her affidavit and of filing her motion in bad faith. Justice Rose proclaims that, "[e]veryone in the State knows I own a bar-restaurant in Las Vegas . . .." Yet, in her affidavit in support of her motion, SHAWNA SNYDER stated, under penalty of perjury, as follows:

> 6. Before the Court's filing of the Opinion on November 30, 1994, I did not know that Justice Rose himself owned a

> tavern in Southern Nevada, and was a liquor vendor.

Exhibit B to motion, page i, lines 21-23; emphasis added.

SHAWNA SNYDER's former counsel, Kenneth J. McKenna, also submitted an affidavit in which he denied having any knowledge of Justice Rose's interest in a tavern, or the liquor industry, during the time he represented her. Exhibit C to motion, page i, lines 24-27.[3]

In DeMetro v. Barad, 576 So.2d 1353 (Fla.App. 1991), the District Court of Appeal of Florida granted a writ of prohibition requiring the disqualification of a trial court judge. The motion was granted partly because the judge had stated that he felt the petitioners had lied. The Court said: "Under Florida law, a judge's statement that he feels a party has lied in a case before him, generally indicates bias against that party." Id., at 1354.

As noted in the Supplemental Statement of Facts, above, Justice Rose states generally in his press release that SHAWNA SNYDER has filed her motion in bad faith. He contends that she submitted her appeal with full knowledge of Justice Rose's disqualifying interest and only complained when the decision proved to be unfavorable to her. Justice Rose's willingness to make the unsupported accusations, 1)

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[3] Appellant's former attorney was suspended from practicing law by this Court for a 45-day period, effective October 6, 1994. In re: Discipline of Kenneth J. McKenna, Case No. 24313. In accord with that Order, he withdrew from this case on Nov. 30, 1994. Later the same day, the Court's 3-to-2 decision was filed in this case. Shawna Snyder was left without any legal representation on the very day of the decision.

that SHAWNA SNYDER lied in her affidavit; and, 2) that she abused and manipulated the appellate processes of this Court, are clearly indicative of bias against her.

It must be noted that Justice Rose's implicit assertion that SHAWNA SNYDER waived her right to complain about the judge's disqualifying interest would be unavailing, in any event. The procedure by which a litigant may waive a right to complain about a judge's disqualifying interest is set forth in Canon 3F, which provides as follows:

> F. Remittal of Disqualification.
>
> A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

The Commentary to Canon 3F specifies that the foregoing, deliberate procedure must be followed without the opportunity for undue influence on the part of the disqualified judge. It states:

> A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure

> that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose a remittal after consultation as provided in the rule. A party may act through counsel if counsel represent on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

A cursory reading of Canon 3F and the accompanying Commentary reveals that a waiver of disqualification cannot take place in the absence of knowledge of the grounds for disqualification. And the judge is under an affirmative duty to come forward with any information relevant to possible disqualification. Indeed, as pointed out in the motion, a judge is required to divulge such information even in instances in which he entertains a good-faith belief that disqualification is unwarranted. It is worth repeating that the Commentary to Canon 3E states, in part:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Were it otherwise, litigants and their counsel would be required, in the exercise of reasonable care, to request voir dire examination of each Supreme Court Justice before every oral argument on appeal, to determine whether any justice

had a financial interest in the outcome of the case. This absurd situation would be required, if Justice Rose's argument prevails, that the burden is on the litigant to ferret out such judicial misconduct. The law presumes a judge who hears a case is unbiased. That is why the burden is placed on the judge -- not the litigant -- to come forward and make disclosure to the litigants of his or her bias, or any possible interest in the outcome of the case.

In his press release, Justice Rose has attempted to shift the burden to SHAWNA SNYDER to ferret out the information concerning the judge's disqualifying interest. By taking this extraordinary position, one which is not supported by any of the authorities located by SHAWNA SNYDER's research, Justice Rose has further evidenced his own bias and prejudice against SHAWNA SNYDER and has fully exposed the intensity of his desire to continue wielding influence over court decisions that affect his own financial interests.

III. CONCLUSION

For all of the foregoing reasons, appellant SHAWNA SNYDER respectfully submits that Justice Rose's dissemination of a press release, which was prepared on the official stationary of the Court, and which directly attacks SHAWNA SNYDER's veracity and impugns her motives, creates yet additional grounds for Justice Rose's disqualification from any further participation in these proceedings.

DATED this 10th of February, 1995.

s/s Peter Chase Neumann
Peter Chase Neumann

CERTIFICATE OF SERVICE ON OPPOSING COUNSEL

I, the undersigned employee of Peter Chase Neumann Professional Corporation, hereby certify, pursuant to NRCP 5(b), that I caused service to be made by PERSONAL DELIVERY this 10th day of February, 1995, upon the following opposing counsel:

Thomas Beko, Esq.
Erickson, Thorpe, & Swainston
P.O. Box 3559
Reno, NV 89509

William C. Jeanney, Esq.
Bradley, Drendel & Jeanney
P.O. Box 1987
Reno, NV 89505

DATED: 2-10-95

s/s Roxanne Polinelli
EMPLOYEE

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWNA SNYDER, AS THE SPECIAL ADMINISTRATOR OF THE ESTATE OF DANIEL PATRICK LOVETT, DECEDENT,

Appellant,

vs.

JOSEPH VIANI,INDIVIDUALLY AND D/B/A JOE'S TAVERN; TOMMY JO MONTOYA; TAMMY ADAMS; MINERAL COUNTY SHERIFF'S OFFICE, FOR A POLITICAL SUBDIVISION; JOHN MADRASO, JR., IN HIS OFFICIAL CAPACITY AS SHERIFF AND INDIVIDUALLY; JOHN LEONHARDT, IN HIS OFFICIAL CAPACITY AS SHERIFF AND INDIVIDUALLY,

Respondents.

CASE NO. 23726

FILED MAR 14 1995

JANETTE M. BLOOM

OPPOSITION TO MOTION TO DISQUALIFY JUSTICE ROSE AND TO REMAND THE DECISION FOR FURTHER PROCEEDINGS; REQUEST FOR AN AWARD OF FEES AND DAMAGES

Respondents JOSEPH VIANI, TOMMY JO MONTOYA and TAMMY ADAMS, by and through their attorneys ERICKSON, THORPE, & SWAINSTON, LTD., and THOMAS P. BEKO, ESQ., and pursuant to NRAP 35(d) and an Order of this Court dated March 2, 1995, hereby submit the following opposition to the Appellant's Motion to Disqualify Justice Robert Rose.

I. STATEMENT OF FACTS: (Taken from Respondent's Brief "Nature of the Case".

This action arises as a result of an automobile accident which occurred on July 13, 1990. At the time of the accident, DANIEL PATRICK LOVETT was approximately three (3) months shy of his 21st birthday. DANIEL PATRICK LOVETT entered JOE'S TAVERN in Hawthorne, Nevada at approximately 11:45 p.m. He stayed there until approximately 1:15 a.m. at which time he left and went to the El Capitan Hotel/Casino where he remained until 6:00 a.m. From there he got behind the wheel of his vehicle destined for Sacramento, California. At approximately 6:30 a.m. and allegedly as a result of his intoxication, Mr. Lovett crossed over the center line of U.S. Highway 95, north of Schruz, Nevada, striking a motorhome which immediately burst into flames killing Mr. Lovett and the four occupants of the motorhome. At the time of the accident, Mr. Lovett had a blood alcohol level of 0.187. (ROA 6)

The Appellant filed her Complaint on March 30, 1992. On August 27, 1992, the Honorable John Davis

entered an Order granting the Defendants' Motion to Dismiss. The plaintiff appealed from that Order on October 2, 1992. On December 21, 1992, Mr. McKenna, Appellant's original counsel, filed a Petition for Writ of Mandamus seeking to set aside an award of sanctions imposed by the trial court against him. Mr. McKenna later withdrew from further representation of Appellant. On November 30, 1994, this Court entered an Order affirming the trial court's dismissal of the Complaint. A Notice in Lieu of Remittitur was given on November 29, 1994.

On or about February 1, 1995, the Appellant filed the instant motion, some sixty-three (63) days after the Court rendered its decision in this matter.

II. SUMMARY OF RESPONDENTS' ARGUMENTS:

A. The only permissible basis for this Court to disqualify Justice Rose is upon proof of actual fraud. The Appellant has failed to make a prima facie showing of fraud.

B. By reference to the Appellant's own exhibits, it is undisputable that Justice Rose had relinquished all interest in the business known as Sidelines, Inc.

C. The Appellant's counsel Kenneth McKenna had actual and constructive notice of Justice Rose's interest in Sidelines, Inc.

D. The underlying action of Snyder v. Viani is not a gaming case.

E. Justice Rose's receipt of campaign contributions from liquor licenses and vendors is immaterial.

F. The violation of Judicial Canons, especially those which allegedly occurred after the Snyder decision cannot form a basis upon which to disqualify Justice Rose.

Respondents will address these issues in the order identified above.

III. LEGAL ARGUMENT:

A. THE APPELLANT HAS FAILED TO MAKE A PRIMA FACIE SHOWING OF FRAUD AND AS SUCH THIS COURT MUST SUMMARILY DENY THE MOTION TO DISQUALIFY JUSTICE ROSE.

As the Appellant correctly points out, at this stage in the proceedings (post decision) the plaintiff may only seek disqualification of a justice if the moving party, through admissible evidence, can prove **fraud** or **illegal** conduct. NRAP 35. Furthermore, this challenge may only be asserted if the moving party had no prior notice, either actual or constructive, of the basis for the challenge.

NRAP 35 is unquestionably a response to the disruptive nature of untimely challenges to the qualifications of the Supreme Court Justices. In fact, it is believed that Rule 35 is the direct result of the late challenge to Justice Gunderson in Ainsworth v. Combined Insurance Company of America, 105 Nev. 237, 774 P.2d 1003 (1989).

Following the adoption of NRAP 35, the grounds upon which a supreme court justice may be disqualified are to be determined by the timing of the challenge. If a challenge is asserted prior to the time when the justice considers contested matters, the challenge may be for any reason provided for in NRS 1.225.1. On the the other hand,

if the challenge is asserted after a contested matter has been considered, the moving party must prove fraud or illegal conduct. NRAP 35

NRS 1.225, reads as follows:

1.225 Grounds and procedures for disqualifying supreme court justices.

1. A justice of the supreme court shall not act as such in an action or proceeding when he entertains actual bias or prejudice for or against one of the parties to the action.

2. A justice of the supreme court shall not act as such in an action or proceeding when implied bias exists in any of the following respects:

(a) When he is a party to or interested in the action or proceeding.

(b) When he is related to either party to or interested in the action or proceeding.

(c) When he has been attorney or counsel for either of the parties in the particular action or proceeding before the court.

(d) When he is related to an attorney or counselor for either of the parties in the particular action or proceeding before the court.

Although the Appellant appears to recognize this direct limitation to any challenge, she has ignored the rule in as much as the essence of her challenge has nothing to do with a "fraud" claim. Although the Appellant begins her argument by making brief reference to a Nevada fraud case, as will be established below, the Appellant has failed to make the necessary threshold showing and as such, this Court should summarily dismiss the motion. See, e.g. Ainsworth, supra, at 270. seeking to disqualify a justice of the supreme court for actual or implied bias shall file a charge in writing, specifying the facts upon which such disqualification is sought. Hearing on such charge shall be had before the other justices of the supreme court.

> 3. A justice of the supreme court, upon his own motion, may disqualify himself
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> 4. Any party to an action or proceeding other hand, if the challenge is asserted after a contested matter has been considered, the moving party must prove fraud or illegal conduct. NRAP 35.
>
> 5. Upon the disqualification of a justice of the supreme court pursuant to this section, a district judge shall be designated to sit in his place as provided in section 4 of article 6 of the constitution of the State of Nevada.
>
> 6. No person shall be punished for contempt for making, filing or presenting a charge for disqualification pursuant to subsection 4.

Appellant places misdirected reliance upon the Nevada decision in Villalon v. Brown, 70 Nev. 456, 273 P.2d 409 (1954). Using this case as an authority for her fraud claim, the Appellant argues that Justice Rose's suppression of material facts (his alleged ownership of taverns) is the legal equivalent of a false representation. The fallacy of this argument is that there is absolutely no evidence that Justice Rose suppressed the material fact of his previous ownership of the business known as Sidelines, Inc. In fact, Justice Rose had fully disclosed his relationship to this business in various public documents. See, also Exhibit E attached to "Response of Justice Rose to Motion to Disqualify Him and Request that Justice Springer Not Participate in the Motion to Disqualify."

In addition, it is irrefutable that Justice Rose's ownership interests in these taverns was widely known throughout the State of Nevada. For many months, (and in fact years) the citizens of the State of Nevada were virtually inundated with allegations of what certain interests characterized as being broken promises relating to Justice Rose's interest in these taverns. This media bombardment came from every form of mass media
from acting in any matter upon the ground of actual or implied bias. Whether Justice Rose wanted this information made public or not, it was repeatedly exposed in the most widespread method conceivable. When considering Justice Rose's required disclosures to the Nevada Gaming Commission, as well as his required financial disclosures, along with the mass media coverage, it is preposterous to argue that Justice Rose "suppressed" facts regarding his tavern interests. As such, the Appellant has not begun to prove the requirement of fraud.

Fraud undoubtedly may be committed by both commission and omission. In the affirmative sense, fraud

requires proof of the making a false representation, with knowledge of the falsity, with the intent to induce reliance, actual reliance and resulting damage. See, Nau v. Sellman, 104 Nev. 248, 757 P.2d 358 (1988). In the negative sense, fraud may be committed by a failure to disclose certain facts. However, the circumstances under which fraud may occur by omission are substantially restricted. In support of her contention that Justice Rose was guilty of fraud, the Appellant quotes a portion of the Villalon v. Brown decision, 70 Nev. 456, **supra**. However, in so doing, the Appellant omits key elements of this tort.

Although correctly reiterating that suppression of material facts may be the equivalent of a false representation, the Appellant fails to follow this premise with the additional stated requirement that the material facts must be "peculiarly" within the knowledge of the party sought to be charged and not within the fair and reasonable reach of the other party. Id., at 468. In such a case, a deliberate failure to correct an apparent misapprehension or delusion may constitute fraud.

In the present case, no reasonable argument can be made that the existence of Justice Rose's previous interests in taverns was "peculiarly" within his own knowledge and not within the fair and reasonable reach of the other party. This information was repeatedly and unquestionably the subject of an exhaustive media blitz. This being the case, it is impossible to say that this information was known only by Justice Rose and not available to the Appellant and/or her counsel. If this were not enough, the Appellant could simply inquire into those public documents of which she is charged with constructive knowledge.

As a final note, it appears that subsequent Nevada decisions further require that the false impression be

deliberately created by the party to be charged. See, Libro v. Wells, 103 Nev. 540, 746 P.2d 632 (1987). There is absolutely no allegation that Justice Rose deliberately refused to disclose this information. The contrary is true.

All the evidence presented in this matter (including the plaintiff's own offered proof) reflects unequivocally that Justice Rose made no effort whatsoever to "suppress" his relationship to the taverns. The worst that can be said is that Justice Rose failed to personally inform the Appellant (or her counsel) of all the information which had been continuously bombarded upon the public by Justice Rose's opponent in the 1994 election. This, however, does not rise to the level of fraud. As such, the motion must be dismissed.

The purpose behind the adoption of NRAP 35 is evident. The Nevada Supreme Court is patently overtaxed with pending appeals. Final judgments must be possessed with a sense of true finality. In an effort to achieve this goal and to promote judicial economy, the Court has seen fit to restrict the grounds upon which late challenges may be asserted. This rule cannot be deemed overly restrictive since the Appellant in this matter had several years within which to develop the necessary factual background and to file her challenge. Having waited until after the decision was rendered, she cannot now be heard to complain.

It should be recognized that the Appellant's challenge herein is not just a challenge to the qualifications of Justice Rose, it also suggests that the entire court lacks ethics and integrity. Considering how well known it was that Justice Rose had previous interests in certain taverns, one must reasonably assume that all of the remaining members of this Court were also aware of this fact. The Respondents are confident that if any of the remaining justices had believed

that Justice Rose should not participate in the Snyder matter, that they themselves would have brought the matter to the direct attention of the entire court. Indeed, each justice would have an obligation to do so. See, Canon 3(D) (1). Having no information that this occurred, clearly this Court was convinced that any interest that Justice Rose may have in the outcome of the matter would be far too tenuous to justify his disqualification.

In conclusion, since the Appellant has failed to establish fraud or illegal conduct, this Court lacks jurisdiction to consider the remaining allegations lodged at Justice Rose. While the Appellant's remaining allegations may, arguably at an earlier stage, have justified the involuntary disqualification of Justice Rose, at this point, they are immaterial as this Court lacks jurisdiction to even consider the claims. Even if the Court found the allegation to be true, they would not be sufficient to alter the outcome of the Snyder decision.

B. THE APPELLANT'S OWN MOTION (INCLUDING EXHIBITS) REFLECTS THAT JUSTICE ROSE DID NOT HAVE A "DIRECT AND SUBSTANTIAL INTEREST" IN THE OUTCOME OF THIS MATTER.

As a prerequisite to finding that Justice Rose committed fraud in this matter, this Court must first find that he had a "direct and substantial interest in the outcome of the matter" which should have been personally disclosed to the Appellant and her counsel. From the Appellant's own exhibits, it is clear that Justice Rose had taken all steps necessary to divest himself of any interest in Sideline, Inc. As reflected in the "Offer and Acceptance Agreement and Earnest Money Receipt" dated July 11, 1994, Justice Rose had unconditionally bound himself to sell his interest in this

business. The only contingency to the completion of this transaction was that the buyers be approved by the Nevada Gaming Commission. Upon the occurrence of this condition, Justice Rose's obligation became absolute after which time he would have no further interest in this business. In reality, at the time of the Snyder decision, Justice Rose would be more accurately described as a "previous" tavern owner.

In considering the nexus between Justice Rose and the Snyder decision, it is helpful to consider those cases actually cited by the Appellant. First, in support of the claim that the Appellant was denied due process, Appellant directs this Court's attention to the United States Supreme Court decision in Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986)[2]

In Lavoie, the Appellant Aetna sought to disqualify, on constitutional grounds, Justice Embry of the Alabama Supreme Court upon the basis that the justice had such an interest in the outcome of the case that the Appellant had been denied due process by the unfavorable decision of the court. The facts of Lavoie are far more egregious than those presented in the instant case. It is obvious why the Appellant did not supply them to this Court.

In Lavoie, supra, Aetna (an insurer) had been sued for insurance bad faith. At the time, this theory of liability had not yet received judicial approval in Alabama. Justice Embry's opinion created for the first time a tort claim for insurance bad faith which authorized an award of punitive damages. However, unbeknownst to Aetna, at the time the decision was rendered, Justice Embry, (as plaintiff) had

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[2] It is noteworthy that this case ws referred to in the Ainsworth decision which rejected a request to disqualify Justice Gunderson following the Court's decision in that case.

pending two identical bad faith lawsuits. Shortly after the decision, Justice Embry settled his own bad faith lawsuit for a sum which he described as a "tidy sum" ($30,000.00). From these facts, it was clear that Justice Embry was actually creating the law for his own case which would, in essence, allow him to act as "a judge in his own case". Not surprisingly, the United States Supreme Court found that Justice Embry's opinion had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case and as such would deprive Aetna of its due process rights.

In reaching this conclusion, the United States Supreme Court began by noting that not all questions of judicial qualifications involve constitutional validity. It observed that matters of "remoteness of interest" are generally matters of legislative directive. Id., at 820. The court concluded that a judge may not hear a case in which he would have a "direct, personal, substantial, and pecuniary interest." Id., at 822.

The United States Supreme Court established that the Alabama court was not merely applying well established law, or that their decision was compelled by earlier decisions, but rather, the Court found that the Alabama court was embarking upon a completely new area in the law. In the present case, the Nevada Supreme Court was urged by the Respondents to simply continue to follow the long line of cases which preexisted in Nevada for many years. Obviously this is another factor which makes this case distinguishable from Lavoie, supra.

This Court should also recognize that in addition to finding that Justice Embry should have been disqualified from the decision making process, the United States Supreme

Court further held that six other justices who heard the case should not be disqualified despite the fact that they, too, were members of a potential class of plaintiffs who had a pending bad faith lawsuit. The Court concluded that their interest was "highly speculative and contingent". Id., at 826. This, the Court ruled, was insufficient to justify disqualification.

A comparison of the instant matter to the Lavoie decision leads to only one conclusion: Justice Rose's interest in the outcome of the Snyder case must be characterized as "highly speculative and contingent" rather than "direct, personal, substantial and pecuniary." In contrast to Justice Embry, for Justice Rose to benefit directly and personally from the Snyder opinion, the following conditions would have to occur:

1. The pending sale of Sidelines, Inc., (pursuant to a binding contract) must not occur;

2. Justice Rose must necessarily retain his ownership interest in Sideline, Inc., following the Chapter 11 reorganization;

3. An underage patron would have to be served alcohol in an establishment owned by Sidelines, Inc.'

4. The underage patron would thereafter have to become involved in an automobile accident which was the proximate result of the ingestion of alcohol wrongfully served by the establishment owned by Sidelines, Inc.;

5. The victim must commence suit against Sidelines, Inc., and after trial a jury must find against Sidelines, Inc.; and,

6. The value of Justice Rose's stock would have to be diminished by reason of a judgment not covered by Justice Rose's liability insurance.

The Respondents submit that the scenario described above is, at best extremely remote and is by no means "direct and substantial". It necessarily follows that even assuming the Appellant's allegations are true, the nexus between the Snyder decision and Justice Rose are far too nebulous to require disqualification.

In deciding the issues presented here, this Court must not lose sight of the fact that a "judge has as great an obligation not to disqualify himself, when there is no occasion to do so, as he has to do in the presence of valid reasons." In Re: Petition to Recall Dunleavy, 104 Nev. 784, 769 P.2d 1272 (1988). A judge has a duty to preside and he or she is presumed to be unbiased. A judge's decision not to voluntarily disqualify himself should be given substantial weight and should not be overturned in the absence of a clear abuse of discretion. Id., at 788. In the present case, Justice Rose was obligated to hear this matter as his remote interest simply did not require his voluntary disqualification.

With regard to the second case cited by the Appellant, State of California v. Kleppe, 431 F.Supp. 1344 (1977), the judge in that matter had been lead counsel for twelve years for a company which had a significant financial interest in the outcome of the case. (The jurist owned stock in that company.) Obviously, he should have been disqualified from hearing the case. By contrast, the nexus between that Court's decision and the benefit to the judge was far closer than what has been presented here. The Court concluded that although the judge may actually be impartial, he has the obligation to always appear impartial.

This Court must keep in mind that while the Canon which requires a court to avoid the appearance of impropriety may establish a basis to support early disqualification, pursuant to NRAP 35, such a challenge may not be made at this stage. As such, Kleppe is of little assistance to this Court in the present matter.

After stripping away the personal attack directed at Justice Rose, what remains is the undisputed fact that during the critical time period, Justice Rose was the owner of a corporation which was under binding contract to sell his entire interest. Would the failure to disclose this fact amount to fraud or illegal conduct? The unmistakable answer must be "no".

Justice Rose's interest in the outcome of the Snyder case is in reality no different from that of most justices in virtually every case. The Respondents herein find it difficult to conceive of any decision which, in one way or another, does not indirectly affect one or more, or all members, of the Court. Each time this Court decides a case which imposes liability upon the owner or occupier of real property, undoubtedly, each member of the Court must consider him or herself personally affected by the ruling. Similarly, every time the Court renders a decision which holds the owner or operator of a motor vehicle responsible, again, one must conclude that each justice has increased their own personal legal exposure.

Along the same line, decisions imposing liability (or decisions precluding liability) in cases such as wrongful termination, general negligence, defamation, invasion of privacy, trespass, etc., also must be deemed to have an impact upon the justices as they would upon every citizen of this state. Without question, Justices of the Nevada Supreme

Court are bound by their own rulings, just as all other people within this State. Not surprisingly, the Justices of this Court are not presented with a demand for disqualification in each of the above cases.

Justices of the Nevada Supreme Court cannot (and should not) live in a proverbial vacuum. Their experiences as ordinary citizens of this state must be considered equally as important to the decision making process as their expertise in the law. One can only imagine the horrors which would be occasioned through the decisions of a court comprised of individuals lacking the ordinary and common experiences of life. Every judicial decision which sets standards of minimum conduct must be tempered by its relative impact upon the general populace of this state. We, of course, do not live in a perfect world and to render decisions upon the assumption that we do would lead to truly disastrous results. Inherent in any sound and workable decision is a keen understanding of just how the decision will affect the everyday lives of the citizens of this state. Justice Rose's previous experience as a tavern owner brings to this Court the opinions of one who truly knows the significance of the Court's potential rulings. One would think that this type of experience would only enhance the Court's awareness of the practical ramifications of its holdings. This is exactly the type of qualifications one would desire of a Supreme Court Justice.

The facts which the Appellant asserts in support of this motion fall clearly within the category of the type of common and expected interest discussed immediately above. They must be contrasted with the specific and unique situation whereby a justice would receive an immediate and direct benefit from the decision rendered as in the Lavoie and Kleppe decisions.

C. THE APPELLANT'S COUNSEL KENNETH MCKENNA HAD ACTUAL AND CONSTRUCTIVE NOTICE OF JUSTICE ROSE'S INTEREST IN SIDELINES, INC.

Even assuming that this Court concludes that Justice Rose was guilty of fraud or illegal conduct, this Court must find that both the Appellant and her counsel had notice of the grounds for the disqualification. With all due respect, the Respondents find it quite difficult to accept the sworn testimony of the Appellant and her previous counsel. It strains every sense of credibility to believe that the Appellant's counsel Ken McKenna was unaware of Justice Rose's ownership interest in Sidelines, Inc. As discussed in detail above, for many years the issue of Justice Rose's tavern ownership has been a major issue raised by those who do not support him. It will be quite some time before the citizens of this state forget the conflict between Justice Rose and his opponent in the 1994 election campaign. It has been suggested that this campaign was undoubtedly the most unpleasant in this State's history. Appellant's contention that neither she nor her counsel were aware of Justice Rose's interest is so unbelievable that this Court should summarily reject the claim.

Most telling in this regard is the Affidavit of Clark Santini which is attached to the Response of Justice Rose wherein Mr. Santini completely contradicts Mr. McKenna's sworn affidavit that he was unaware of Justice Rose's tavern ownership. Not only does Mr. Santini's affidavit eliminate the basis for Appellant's present motion, it reveals that Mr. McKenna committed perjury by swearing to this affidavit.

Without question, the factual scenario described by Mr. Santini is entirely consistent with that which one would

expect of an attorney licensed in this State, who himself was contemplating running for public office. Furthermore, it is completely consistent with the state of knowledge which one would expect of any attorney who was asking the Court to reverse a long line of prior holdings. As this Court knows, the facts of the Snyder matter were virtually indistinguishable from those in the Hinegardner v. Marcor Resorts, 108 Nev. 1091, 844 P.2d 800 (1992), decision which was issued by the Court less than one year before.

Mr. McKenna had to know that in order to prevail in the Snyder matter he would have to convince at least one justice to change his previous position. This, of course, further assumes that Justice Shearing would adopt the position of her predecessor. Presented with this situation, Mr. McKenna would have to know that his chances for success were inextricably tied to his ability to convince at least one justice to alter his previously reported position. To think that Mr. McKenna would embark upon this process without availing himself of all available background information simply is unbelievable.

The reasoning described by Mr. Santini is clearly one which was expressed by most, if not all, legal counsel in this state who were familiar with this lawsuit. Common sense dictates that Mr. McKenna was keenly aware of Justice Rose's previous interest. Yet, he intentionally chose to await the Court's decision and then assert his disqualification argument as a last ditch effort.

This Court has expressly acknowledged that attorneys must be presumed to have that degree of notice or knowledge which would be possessed by a reasonable and ordinary attorney licensed in this state. In footnote 17, (page 263) of the Ainsworth v. Combined Insurance Co., supra, this Court

made specific reference to presumed knowledge of the existence of an award given to Justice Gunderson. This Court found that knowledge of this award was presumed from counsel's membership in the NTLA and the newspaper accounts following the award.

Furthermore in footnote 21 at page 268, this Court again noted that it would "strains credulity" to suppose that counsel was not aware of these matters which had become "highly publicized within the state". In this case, it is quite difficult to recall any matter of public concern which was more highly publicized than Justice Rose's tavern ownership.

It follows therefrom that this Court should conclude that Mr. McKenna and the Appellant either knew, or should have known (constructive knowledge) of Justice Rose's nexus to Sidelines, Inc. As such, the Appellant's challenge herein is barred.

D. THE UNDERLYING ACTION OF SNYDER V. VIANI, IT IS NOT A GAMING CASE.

The Appellant has asserted a spurious argument that since Justice Rose must disqualify himself from gaming cases, he should not have participated in the Snyder decision. The obvious fallacy of this argument is that Snyder is not a gaming case. The case has absolutely nothing to do with legalized gaming. It deals with one issue, the sale of intoxicating liquor, period.

E. JUSTICE ROSE'S RECEIPT OF CAMPAIGN CONTRIBUTIONS OF LIQUOR LICENSEES AND VENDORS IS IMMATERIAL.

As pointed out by this Court, in In Re Petition to Recall Dunleavy, 104 Nev. 784, 769 P.2d 1271 (1988), the mere receipt of campaign contributions is insufficient grounds upon which to disqualify a justice. This is especially true where the main industry of the state is gaming. It is preposterous to think that a candidate should be elected to a state wide position without accepting some contributions from the liquor and gaming interests. Additionally, how could the plaintiff possibly claim that she was not aware of this fact prior to the Court's decision in the Snyder case. Without question, each candidate must file periodic reports of contributions. If Appellant had truly been concerned, she (or her attorney) should have made further inquiry. They were undoubtedly aware of this fact and chose to ignore it. As such, they have waived the claim. See, Ainsworth, supra, at p. 264, footnote 17.

F. THE VIOLATION OF JUDICIAL CANONS, ESPECIALLY THOSE WHICH ALLEGEDLY OCCURRED AFTER THE SNYDER DECISION, CANNOT FORM A BASIS UPON WHICH TO DISQUALIFY JUSTICE ROSE.

The remainder of the Appellant's arguments relate to alleged violations of various judicial canons. However, as described in detail above, these alleged misdeeds cannot form the basis for a post decision challenge. As such, the Court should refuse to even entertain the arguments. While the Respondents have no intention or desire to become involved in a political battle of name calling, one must question why the Appellant raises so many matters which, even if true,

would not form a legal basis for relief. This is especially true as to those matters which have allegedly occurred after the Court's decision and subsequent to the filing of the Appellant's motion.

Whatever the driving force may be, the undisputed result is that the Respondents have been forced to respond to a hollow and untimely motion, the substance of which has already been decided on the existing law and facts. Respondents have been forced to incur additional legal expenses to preserve the previous ruling of this court. In so doing, the Respondents have incurred an additional indebtedness of $3,600.00 While this sum may appear insignificant to the Appellant, or her new counsel, to the Respondents who lack any insurance coverage for this loss, the amount is devastating. The Respondents' therefore request that the
Court enter an Order granting the Respondents $3,600.00 for expenses incurred in defending against this post decision motion.

RESPECTFULLY SUBMITTED this 14th day of March, 1995.

ERICKSON, THORPE, & SWAINSTON, LTD.
601 South Arlington Avenue
P.O. Box 3559
Reno, Nevada 89505
s/s THOMAS P. BEKO
THOMAS P. BEKO, ESQ.
Attorneys for Respondents

CERTIFICATE OF MAILING

I hereby certify that I am an employee of ERICKSON, THORPE, & SWAINSTON, LTD.; I further certify that on the 14th date of March, 1995, I deposited for mailing at Reno, Nevada, in full compliance with the provisions of N.R.A.P. 25(c), a true and correct copy of the attached document addressed to:

William C. Jeanney, Esq.
Bradley & Drendel, Ltd.
P.O. Box 1987
Reno, NV 89505

Peter Chase Neumann,
136 Ridge Street
P.O. Box 1170
Reno, Nevada 89504

s/s Debbie J. Aguirre
Debbie J. Aguirre

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWNA SNYDER, AS THE SPECIAL ADMINISTRATOR OF THE ESTATE OF DANIEL PATRICK LOVETT, DECEDENT,

Appellant,

vs.

JOSEPH VIANI, INDIVIDUALLY AND D/B/A JOE'S TAVERN; TOMMY JO MONTOYA; TAMMY ADAMS; MINERAL COUNTY SHERIFF'S OFFICE, A POLITICAL SUBDIVISION; JOHN MADRASO, JR., IN HIS OFFICIAL CAPACITY AS SHERIFF AND INDIVIDUALLY; JOHN LEONHARDT, IN HIS OFFICIAL CAPACITY AS SHERIFF AND INDIVIDUALLY,

Respondents.

No. 23726

FILED
JUL 14 1995
JANETTE M. BLOOM,
CLERK OF SUPREME COURT

SHAWNA SNYDER'S REPLY IN SUPPORT OF MOTION TO DISQUALIFY JUSTICE ROSE

COMES NOW Shawna Snyder Lovett, as the Special Administrator of the Estate of Daniel Patrick Lovett and, pursuant to the Court's Order of June 30, 1995, hereby replies in support of her Motion to Disqualify Justice Rose.

This reply is made upon the grounds set forth in the accompanying memorandum of points and authorities and is based upon all pleadings, papers and documents on file herein.

DATED this 14th day of July, 1995.

s/s Peter Chase Neumann
Peter Chase Neumann, Esq.
136 Ridge Street
Post Office Box 1170
Reno, Nevada 89504
(702) 786-3750

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISQUALIFY JUSTICE ROSE

I. THE ROSE "AFFIDAVIT" IS A DEFECTIVE, FUGITIVE DOCUMENT THAT SHOULD BE STRICKEN FOR ITS FAILURE TO MEET EVEN THE MOST RUDIMENTARY REQUIREMENTS OF A VALID, SWORN AFFIDAVIT

Justice Rose's so-called "affidavit" is so violative of basic precepts regarding the use of such documents that it should be stricken in its entirety. Indeed, Justice Rose's "affidavit" reads as if it were intended to illustrate multiple violations of every imaginable requirement of form and content. It is remarkable that a member (and former Chief Justice) of this Court would either be so completely unaware of the rules as to tender a document like Justice Rose's defective "affidavit," or have such contempt for these rules as to file the "affidavit" in knowing violation of them. In either event, the document should be stricken, as it would surely be were it tendered to this Court by any ordinary litigant. Failure to do so would raise serious questions as to whether there is a different, more lenient set of rules for supreme court justices appearing before this Court than for other parties.

A. JUSTICE ROSE HAS FAILED TO PROPERLY SWEAR TO (OR AFFIRM) THE TRUTH OF THE ASSERTIONS OF HIS "AFFIDAVIT" AND, THUS, THE OCUMENT IS NOT A STATEMENT MADE UNDER OATH

The Rose "affidavit" is not properly sworn. In Jordan v. Deery, 609 N.E.2d 1104 (Ind. 1993), the Supreme Court of Indiana set forth the test for determining the adequacy of an affidavit. The Court said:

> An affidavit has been defined as a written statement of fact which is sworn to as the truth before an authorized officer. Dawson v. Beasley (1962), 242 Ind. 536, 542, 180 N.E.2d 367, 370. The chief test of the sufficiency of an affidavit is its ability to serve as a predicate for a perjury prosecution. Wallace v. State (1927), 199 Ind. 317, 326, 157 N.E. 657, 661.

Id., at 1110; emphasis added.

The so-called "affidavit" of Justice Rose is not sufficient when tested against this standard. In White v. State, 102 Nev. 153, 717 P.2d 45 (1986), this Court held that, "the mere signing of an affidavit before an officer does not constitute the act necessary to constitute an oath." Id., at 157. The Court explained its holding as follows:

> We have previously addressed the question of the sufficiency of the evidence necessary to support a perjury conviction in State v. Pray, 64 Nev. 179, 179 P.2d 449 (1947). . . .. State v. Pray cited O'Reilly v. People, 86

> N.Y. 154 (1881), which reversed a conviction for perjury on evidence that the defendant signed and handed a document to an officer and the officer affixed his name to it in silence. The New York court noted that, under such circumstances, "any form of an oath is rendered unnecessary, and the intention to swear is put in the place of the oath actually administered and taken . . . [O]nly by some unequivocal form could the sworn be distinguished from the unsworn averment. . . ." Id., at 157. That court also stated that there must be an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath and that the mere delivery of a signed affidavit to an officer was not such an act. See also In re Rice, 181 N.E.2d 742 (Ill.App.Ct. 1962); Spangler v. District Court of Salt Lake County, 140 P.2d 755 (Utah 1943). The court pointed out that the wording of the affidavit "[affiant] being duly sworn," rather than "I do hereby swear," showed that the signing itself did not constitute the act or obligation of the oath itself.

Id., at 156; emphasis added.

Shortly after this Court's decision in White v. State, the Judges of the Second Judicial District Court interpreted the decision to require that affidavits be introduced with the unequivocal statement, "I do hereby swear," rather than the disapproved, "[affiant] being duly sworn." The Judges published a notice in The Writ, a publication of the Washoe County Bar Association. The notice stated as follows:

Immediately after publishing of this notice in the Writ any affidavit, required by any statute or rule, to be accepted by the Second Judicial District Court shall state:

> I, (affiant) do hereby swear (or affirm) under penalty of perjury that the assertions of this affidavit are true."

(See Exhibit "A", attached).

Justice Rose's "affidavit" contains the language specifically found insufficient in White. His affidavit begins as follows: "COMES NOW, Robert E. Rose, and being duly sworn, deposes and says . . .." Rose "affidavit", page 1, lines 3-5; emphasis added. Justice Rose's fugitive "affidavit" fails to make an unequivocal commitment ("I do hereby swear") to the truth of his assertions. Therefore, Justice Rose's "affidavit" is not made under oath and must be deemed to be nothing more than an unsworn statement.

As the Court is well-aware, unsworn statements will not be considered in disposing of motions. In the context of a summary judgment case, the U.S. Court of Appeal for the Fifth Circuit said:

> On the other side of this issue, we note that Gordon's "Answer to defendants' Motion for Summary Judgment" also fails to comply with Rule 56. It is an unsworn statement, which the court may not consider in determining the propriety of summary judgment. Adickes v. S. H. Kress & Co., 398 U.S. 144, 159 90 S.Ct, 1598, 1609, 26 L.Ed.2d 142 (1970); Piper v. United States, 392 F.2d 462 (5th Cir. 1968); Jones v. Menard, 559 F.2d 1282, 1285 n. 5 (5th Cir.

> 1977). See 6 Moore's Federal Practice ¶ 56.11[1.-8], at 207 (2d ed. 1948; id. ¶ 56.22[1], at 1304; 10 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2738, at 702 (1973).

Gordon v. Watson, 622 F.2d 120, 123 (5th Cir. 1980).

The requirement of properly sworn affidavits has been explicitly incorporated into judicial disqualification proceedings in this Court under NRAP 35. Assertions of fact must be documented by references to the record or by "proper sworn averments in the affidavits . . .." NRAP 35(a); emphasis supplied. Because Justice Rose's defective "affidavit" is not properly sworn, it should be stricken.

B. JUSTICE ROSE'S FUGITIVE "AFFIDAVIT" IS SO FRAUGHT WITH BLATANT VIOLATIONS OF THE MOST BASIC REQUIREMENTS THAT THE ENTIRE DOCUMENT SHOULD BE STRICKEN ON THIS BASIS AS WELL

The requirements for a valid affidavit are well known and are similar in every context in which the use of evidentiary affidavits is permitted. For example, NRCP 56(e), which was promulgated by this Court, sets forth the following requirements of affidavits in the context of summary judgment proceedings:

> [A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. (Emphasis added.)

DCR 13(5), which was also promulgated by this Court, governs the use of affidavits in other evidentiary contexts in the trial courts of Nevada. This rule similarly states, in relevant part, that:

> Affidavits shall contain only factual, evidentiary matter, shall conform to the requirements of NRCP 56(e), and shall avoid mere general conclusions or argument. Affidavits substantially defective in these respects may be stricken, wholly or in part. (Emphasis added.)

In sum, the requirements pertaining to evidentiary affidavits appear to be universal. They obtain under the Federal Rules of Civil Procedure, see Fed.R.Civ.P. 56(e), and have been expressly incorporated by this Court into proceedings to disqualify supreme court justices under NRAP 35(b).

Because of the rambling, narrative style of Justice Rose's "affidavit," it is difficult to isolate the multiplicity of violations of the foregoing requirement. However, there are several examples which affirmatively demonstrate 1) that Justice Rose is not competent to testify to the matters contained therein, 2) that the assertions being made are not based upon personal knowledge, and 3) that the "affidavit" is not limited to factual material that would be admissible in evidence. Even when the examination is limited to these particularly egregious examples, the violations are numerous.

For example, on page 6, at line 8, Justice Rose begins an assertion with the phrase, "I can only assume . . .." A statement which is based upon the affiant's assumption is clearly irreconcilable with the requirement that statements be

based upon personal knowledge and that they be limited to factual, evidentiary material. Two lines later, Justice Rose begins another assertion with the phrase, "I have been informed . . .." This phrase is the classic introductory language for inadmissible hearsay, which again is antithetical to the requirement that assertions be based upon personal knowledge and that they be limited to factual statements which would be admissible in evidence.

At line 21 of the same page, Justice Rose starts a sentence with, "Perhaps . . .." This introductory word reveals that the following statement is conjectural in nature and is violative of the requirements discussed above. At line 27, Justice Rose begins a sentence with, "It is doubtful . . .." Again, this indicates that Justice Rose is expressing an opinion, rather than relating factual, evidentiary statements.

At the top of page 7, at line 1, Justice Rose begins another sentence with, "I am informed and believe . . .." It is improper to include statements made upon "information and belief" in an affidavit. See 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2738, page 489 (2d ed. 1983).

At page 7, line 6, in discussing Mr. Neumann's supposed motive for bring this motion, Justice Rose states, "I believe . . .." Justice Rose then states, "The second reason I believe . . .." Id., at line 27. Justice Rose's self-serving opinions as to Mr. Neumann's motives in representing SHAWNA SNYDER hardly qualify as factual, evidentiary statements. On page 12, lines 3-4, Justice Rose reverts to additional improper references to his "information and belief."

On page 13, at line 27, Justice Rose attempts to rest his testimony on "probability." This is, of course, violative of the requirement that affidavits contain factual, evidentiary statements. He attempts to testify to the "probable" future conduct of Judge Steffen on page 14, line 5. Such "testimony" also does violence to the requirement that assertions be factual and admissible; statements as to "probable," future events cannot meet this requirement.

In Saka v. Sahara-Nevada Corp., 92 Nev. 703, 558 P.2d 535 (1976), this Court said:

> It is not sufficient that pleadings be supported by affidavits alleging specific factS these facts must be made upon affiant's personal knowledge, and there must be an affirmative showing of his competency to testify to them.

Id., at 705. See also Gunlord Corp. v. Bozzano, 95 Nev. 243, 591 P.2d 1149 (1979); Daugherty v. Wabash Life Ins. Co., 87 Nev. 32, 482 P.2d 814 (1971); Catrone v. 105 Casino Corp., 82 Nev. 166, 414 P.2d 106 (1966). In light of the overwhelmingly deficient nature of Justice Rose's "affidavit," the issue is whether these requirements, that have been consistently applied against all ordinary litigants before this Court, also apply to Justice Rose.

II. JUSTICE ROSE'S PARTICIPATION IN SHAWNA SNYDER'S APPEAL CREATED A DISQUALIFYING APPEARANCE OF IMPROPRIETY

The Court recently had occasion to apply the "appearance of impropriety" standard in PETA v. Bobby Berosini, Ltd., 111 Nev. ___, 894 P.2d 337 (Adv. Opn. No.

36; filed April 14, 1995). The case involved an appeal by People for the Ethical Treatment of Animals (PETA) from a judgment for defamation and invasion of privacy. The suit had been brought by Berosini and was based upon the fact that PETA had videotaped him striking his performing orangutans with a rod.

This Court entered its initial opinion reversing the money judgment. The opinion was signed by three justices of this Court and District Judge Lehman; Judge Lehman was sitting in place of Justice Rose, who had voluntarily recused himself. Berosini then filed a motion to disqualify Judge Lehman on the grounds that, while the case was under submission to this Court, he was a member of a six-person advisory board of Animal Foundation of Nevada (AFN)--an organization whose primary activity was running a spay and neuter clinic.

There was no showing that Judge Lehman had been involved in PETA or that he ascribed to its views concerning animal rights. There was a showing that a member of a different AFN board was a member of PETA and had been involved in some of the events leading to the litigation. There was further evidence that another individual with ties to AFN was a member of PETA and had appeared on television on PETA's behalf.

The Court began its analysis by emphasizing that the "appearance of impropriety" standard is applied objectively and that it is immaterial whether the challenged judge is actually impartial. Id., at ___, 894 P.2d at 340. The Court also stressed that it did not believe that Judge Lehman was subjectively biased. The question, however, was "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about Judge Lehman's impartiality." Id.,

at ___, 894 P.2d at 341. The Court concluded that application of this objective standard required Judge Lehman's disqualification. The Court said:

> Nonetheless, we conclude that we must grant the motion to disqualify Judge Lehman to avoid even the appearance of impropriety and to promote public confidence in the integrity of the judicial process. We conclude that a reasonable person, knowing all the facts, would harbor reasonable doubts about Judge Lehman's impartiality. Judge Lehman's role as an Advisor to an animal foundation, even one solely devoted to sterilizing animals and pet care, would cause a reasonable person to wonder whether Judge Lehman could be completely neutral and detached when deciding whether appellants' actions were tortious. Further, a trustee of the foundation was active in the animal rights movement and an occasional spokeswoman for the foundation was an active PETA member and a defendant in this action. Judge Lehman's association with these players could cause a reasonable person to question his impartiality.

Id.

Justice Rose's appearance of impropriety is far more stark than that of Judge Lehman. Judge Lehman merely happened to be an Advisor to a nonprofit, civic-minded foundation. AFN did not share the same goals and interests of PETA. Judge Lehman did not engage in any affirmative conduct which led to the appearance of impropriety, nor did anyone do so on his behalf. Rather, the appearance of

impropriety was created by the conduct of other individuals with whom Judge Lehman had almost no contact. In other words, Judge Lehman had virtually no control over the circumstances that led to his disqualification.

There is a marked contrast between Judge Lehman's circumstances with those of Justice Rose. While the instant case was under submission, Justice Rose owned a tavern or bar. As a bar owner, he quite clearly shared the goals and interests of the liquor industry as a whole in limiting the potential exposure to dram shop liability. This unity of interest was expressed directly, through his own bar manager, when he announced, in an open letter to other bar owners, that Justice Rose would cast his vote against dram shop liability. This was done in an effort to solicit campaign donations from fellow liquor purveyors and was predicated on the statement that it presented an issue that was critical to "our livelihood."

III. SHAWNA SNYDER'S MOTION TO DISQUALIFY JUSTICE ROSE IS TIMELY

Both Justice Rose and the Defendants contend that Shawna Snyder's motion to disqualify is untimely based upon the following language of NRAP 35:

> In no event will the supreme court deem timely any motion or charge seeking the disqualification or recusal of a justice who has heard oral argument upon, or otherwise considered, any contested matter in the cause, except as to grounds based on fraud or like illegal conduct of which the challenging party had no notice until after the contested matter was considered.

It is contended that Shawna Snyder has not shown "fraud or like illegal conduct" and therefore her motion should not be "deem[ed] timely." This point was also addressed in PETA because, there as here, the motion to disqualify was made after the disqualified justice's participation in oral argument. In footnote 2 of the PETA decision, the Court said:

> Although Berosini's motion to disqualify Judge Lehman is arguably untimely pursuant to NRAP 35, we have elected to entertain the motion because, under the unique circumstances of this case, Berosini did not know, and could not reasonably have known, about Judge Lehman's alleged appearance of partiality before Judge Lehman heard argument in this matter. See generally Blaisdell v. City of Rochester, 135 N.H. 589, 609 A.2d 388, 391 (1992); Com. v. Hammer, 508 Pa. 88, 494 A.2d 1054, 1058-59 (1985); Gulf Maritime Warehouse Co. v. Towers, 858 S.W.2d 556, 562 (Tex.Ct.App.1993).

Id., at ___ n.2, 894 P.2d at 338 n.2

An examination of the authorities cited by the Court is instructive. In Blaisdell, the disqualified justice tendered the same excuse for nondisclosure that has been here proffered by Justice Rose. In his fugitive document "affidavit," Justice Rose states as follows: "I believed that everyone in the state knew I owned a bar in Las Vegas . . .." Rose "affidavit", page 4, lines 9-10. Similarly, the justice in Blaisdell stated that he took it for granted that "everybody knew" his uncle worked as an attorney for one of the law

firms involved in the litigation before him. The Blaisdell Court found this explanation insufficient. The Court said:

> At this juncture, we caution that it is the judge's responsibility to disclose, sua sponte, all information of any potential conflict between himself and the parties or their attorneys when his impartiality might reasonably be questioned. Sup.Ct.R. 38, Canons 3 C, D (Code of Judicial Conduct); see also Scott v. United States, 559 A.2d 745, 749 (D.C.1989); Adams v. State, 269 Ark. 548, 552, 601 S.W.2d 881, 885 (1980). **Neither the client nor his attorney have any obligation to investigate the judge's impartiality**. See Reilly by Reilly v. Southeastern Pa. Transp., 330 Pa.Super. 420, 479 A.2d 973, 986-88 (1984).

Id., at 390; emphasis added.

After stating that the Court "cannot make . . . a presumption" that "everybody knew" of the relationship, id., at 391, the Court went on to discuss the proper manner of obtaining a waiver of the appearance of impropriety. The Court said:

> New Hampshire's canons of judicial conduct require, at a minimum, that [an appearance of impropriety] be avoided by giving the parties and their lawyers an opportunity, upon receiving notice of the relationship, to agree in writing that the judge may hear their dispute. Sup.Ct.R., Canon 3 D (Code of Judicial Conduct). Absent such a written agreement

> between the parties, **which cannot be obtained without disclosure of the conflict**, the judge may not sit on the case. Accordingly, we hold that a judge's failure to disclose to the parties the basis of his or her disqualification under Canon 3C will result in a disqualification of the judge. (Emphasis added.)

Id.

Com. v. Hammer, 494 A.2d 1054 (Pa. 1985), sheds more light on the propriety of a judge attempting to justify a failure to disclose upon the grounds that he assumed everybody knew the facts and circumstances. The Court began by observing that, "[t]he notion that the judge is the foremost regulator of his own conduct is amply recognized by the Code of Judicial Conduct . . .." Id., at 1058. The Court then said:

> It would indeed be a contemptible system which required counsel in a civil case to ferret out the potential conflicts of interest residing, for example, in a judge's financial interests in order to obtain the judge's disqualification. **That duty resides expressly with the judge**.

Id., at 1059; emphasis added.

Similarly, in Gulf Maritime Warehouse Co. v. Towers, 858 S.W.2d 556 (1993), the Court rejected the contention that the litigants affected by an appearance of impropriety should be required to go searching for information leading to the possible disqualification of a judge; it is the duty of the judge to disclose such information. The Court said:

> Reason is over extended when we require parties to lawsuits to seek a back door, covert, indirect method of determining whether a trial judge is disqualified. That burden rests more fairly upon those with knowledge of potential impediment.

Id., at 562; emphasis added.

As with most states, Nevada's Code of Judicial Conduct contains a specific procedure to effectuate a waiver of an appearance of impropriety. Canon 3F reads as follows:

> F. Remittal of Disqualification.
>
> A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

The substance of the argument of Justice Rose and the Defendants is that these carefully crafted procedures can be bypassed by a media blitz pertaining to an election campaign which was largely ignored by most people in Nevada. Canon 3F is analogous to 28 U.S.C. § 455. In construing the

federal statute, the U.S. Court of Appeals for the Sixth Circuit observed that the requirement that the disclosure be made "on the record" must be strictly construed. The Court said:

> There is no disclosure "on the record" and therefore no properly obtained "waiver." It is obvious that the District Court did not comply with this subsection's disclosure and waiver requirements, which its plain language, legislative history, and the case law tell us must be strictly construed. See, e.g., United States v. Murphy, 768 F.2d 1518, 1538-39 (7th Cir.1985), cert. denied, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986); Portashnick v. Port City Construction Co., 609 F.2d 1101, 1114-15 (5th Cir.) (dicta), cert. denied, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

Id., at 1362.

Thus, Justice Rose had an affirmative duty to come forward and disclose "on the record" any facts and circumstances which might reasonably be deemed relevant to the question of disqualification. Canon 3E Commentary. This duty exists despite the judge's own belief that no appearance of impropriety exists. PETA v. Bobby Berosini, Ltd., 111 Nev. ___, 894 P.2d 337 (Adv. Opn. No. 36; filed April 14, 1995). He cannot now argue that a "waiver" was effectuated by disclosure through his opponent's political ads,

where there is no evidence that Shawna Snyder learned of his interest in Sidelines Bar through this or any other source.[1]

In summary, PETA stands for the proposition that the fraud requirement of NRAP 35 will not be adhered to strictly in instances in which the litigant did not know, and could not reasonably have known, of the appearance of impropriety before the triggering events of NRAP 35. Shawna Snyder's affidavit that she had no knowledge of Justice Rose's interest in a bar is undisputed. It is submitted that it would be a very dangerous step for the Court to adopt a philosophy of excusing a jurist's failure to affirmatively disclose facts relevant to his disqualification based upon a per se rule that all Nevadans are charged with knowledge of, and expected to rely upon, what appears in the newspapers --particularly that which emerges from unsavory political campaigns.

Assuming that the fraud requirement is more strictly construed, however, it is incorrect to suggest, as do the Defendants and Justice Rose, that the judge in question must be shown to have actively concealed the relevant information. As noted in Shawna Snyder's motion, liability for fraud can rest upon passive nondisclosure. It does not require active concealment. This point is addressed in the Restatement (Second) of Torts § 551(1) (1977), where the legal principle is stated as follows:

> § 551. Liability for Nondisclosure
> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other

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[1]It is noteworthy that this case was referred to in the Ainsworth decision which rejected a request to disqualify Justice Gunderson following the Court's decision in that case.

> to act or refrain from acting in a business transaction is subject to the same liability to the other **as though he had represented the nonexistence of the matter that he failed to disclose**, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question. (Emphasis added.)

Clearly, under the Code of Judicial Conduct, Justice Rose was under an absolute duty to disclose anything which the parties and lawyers may deem relevant to the question of his disqualification. Thus, the predicate for fraud through nondisclosure is present. The protestations to the contrary are vacuous.

IV. JUSTICE ROSE CANNOT JUSTIFY HIS FAILURE TO DISCLOSE INFORMATION RELEVANT TO AN APPEARANCE OF IMPROPRIETY BY AN APPEAL TO THE "DUTY TO SIT"

The first nine pages of Justice Rose's points and authorities are based upon the argument that, "[i]t is the duty of a justice or judge to sit on a case and to resist attempts to disqualify if he or she believes there is no basis for disqualification." Points and authorities, page 1, lines 2-4; upper case and underscoring deleted. Unfortunately, Justice Rose's jurisprudential acuity concerning the "duty to sit" is no more keen than his knowledge of the requirements of evidentiary affidavits.[2]

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[2]In reality, Justice Rose's "duty to sit" argument is little more than a pretext to repeat his bizarre contention that he is the victim of a conspiracy among those who know former Chief Justice Gunderson. Shawna Snyder will

It is true that a judge has a duty to preside in the absence of some statute, rule of court, ethical standard, or other compelling reason. PETA v. Bobby Berosini, Ltd., supra; Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988). However, the "duty to sit" does not serve as a justification for failure to comply with the Code of Judicial Conduct. More specifically, the "duty to sit" cannot be interpreted to permit a justice to "resist attempts to disqualify" by failing to disclose to the parties and their counsel the information which they would deem relevant to the question of his disqualification. The "duty to sit" does not permit a judge to rely upon media coverage and his opponent's political ads to fulfill his duty of disclosure.

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not be baited into a discussion about these allegations, nor will she dignify with a response Justice Rose's analysis of what was argued in Ainsworth v. Combined Insurance Co., 105 Nev. 237, 774 P.2d 1003 (1989), but not discussed in this Court's opinion. She is confident that this Court realizes that the legal principles for which the Ainsworth opinion may be properly cited are contained in the decision itself, even if Justice Rose has forgotten this elementary point.

Insofar as the Ainsworth decision is relevant at all, it is distinguishable. In Ainsworth it was uncontroverted that the movants had acquired knowledge of the relevant facts and circumstances through media coverage. Here, it is uncontroverted that Shawna Snyder acquired no such knowledge. Ainsworth is inapposite.

SUMMARY AND CONCLUSION

Shawna Snyder's Motion To Disqualify Justice Rose, Vacate the Court's Opinion, and Remand the Decision For Further Proceedings is properly based upon facts and sound legal principles. Justice Rose, as a bar owner with a direct financial interest in promulgating immunity for himself and all bar owners from dramshop liability, was disqualified from sitting on Shawna Snyder's case. At a minimum, his participation constituted the appearance of impropriety. That his vote was important is evidenced by the three-to-two decision in the case, in which Justice Rose cast the deciding vote against bar owner liability. His Response and its "affidavit" notwithstanding, it is clear and totally uncontroverted that he failed to disclose to Shawna Snyder and her counsel, as well as the defendant and his counsel, his own interest in the liquor industry of Nevada.

The law clearly required Justice Rose to make an affirmative disclosure to the parties of his financial interest in the outcome of the case, which he failed to do.

The Response filed by Justice Rose, accompanied by a fugitive "affidavit" which does not even begin to comply with the rules established by this Court, and which contains numerous hearsay and conclusory opinions which are inadmissible, avoids the issue raised by Appellant.

WHEREFORE, appellant Shawna Snyder, as administrator of the Estate of Daniel Lovett, respectfully requests this Court to grant the relief prayed for in her Motion To Disqualify Justice Rose. Justice, and the appearance of justice, requires nothing less.

Respectfully submitted this 14th day
of July, 1995.

s/s Peter Chase Neumann
Peter Chase Neumann
For the Appellant Snyder

CERTIFICATE OF SERVICE ON OPPOSING COUNSEL

I, the undersigned employee of Peter Chase Neumann Professional Corporation, hereby certify, pursuant to NRCP 5(b), that I caused service to be made by mail, postage prepaid, this 14th day of July, 1995, upon the following:

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Hon. Robert Rose
Associate Justice
Nevada Supreme Court
Capitol Complex
Carson City, NV 89710

DATED: s/s 7-14-95

s/s ROXANNE POLINELLI
EMPLOYEE

CANON 1

A judge shall uphold the integrity and independence of the judiciary.

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective. (Emphasis supplied.)

CANON 2

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. (Emphasis added.)

CANON 3

A judge shall perform the duties of judicial office impartially and diligently.

E. Disqualification.

> (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, ... (Emphasis added.)

The Commentary to this Canon states, in part, as follows:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

CANON 4

A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

A. Extra-judicial activities in general.

A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;. . . .

D. Financial Activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position . . ..

CANON 5

A judge or judicial candidate shall refrain from inappropriate political activities.

A. All Judges and Candidates.

. . ..

(3) A candidate for a judicial office:

. . ..

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . .. (Emphasis added.)+

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(3)

No. 96-168

In The
Supreme Court of the United States
October Term, 1995

SHAWNA SNYDER,

Petitioner,

v.

JOSEPH VIANI,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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27 pp

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STATUTES AND RULES

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OTHER AUTHORITIES

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In The
Supreme Court of the United States
October Term. 1995

SHAWNA SNYDER,
Petitioner,

v.

JOSEPH VIANI,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner's petition omits and mischaracterizes the facts giving rise to the decision sought to be reviewed, fails to present a substantial federal question, and ignores adequate state grounds for the ruling below. The petition should be denied.

STATEMENT OF THE CASE

Petitioner's action seeks to benefit the estate of a deceased minor who consumed alcoholic beverages at respondent's tavern, then visited a second tavern not a party to the action below for over five hours, after which his

vehicle crossed the center line and collided with a motor home, killing not only himself but also the four occupants of the motor home, who also are not parties to the action below. App. 2a-3a. Petitioner's action has nothing whatsoever to do with gaming in any respect.

Prior to petitioner's action below, the Nevada Supreme Court had repeatedly held that furnishing alcoholic beverages to one subsequently involved in an accident did not give rise to a cause of action for injuries suffered in the accident and that the violation of statutes regulating the sale of alcohol to underaged or intoxicated persons did not constitute negligence per se. *See, Hinegardner v. Marcor Resorts*, 108 Nev. 1091, 844 P.2d 800 (1992) and cases cited therein. In *Hinegardner*, the Nevada Supreme Court reaffirmed its prior holdings, emphasizing that the wisdom of any change in Nevada law on this issue was for the Nevada legislature. Justices Robert Rose and Charles Springer concurred in the majority opinion in *Hinegardner*, while Justice Thomas Steffen (and another justice no longer on the court) dissented. In 1995, the Nevada legislature

enacted Nev. Rev. Stats. §41.1305, confirming that *Hinegardner* correctly perceived and reflected Nevada public policy on this issue.

At the time petitioner commenced her action below and *Hinegardner* was decided, Justice Rose had, since 1982, held an ownership interest in a corporation that owned and operated sports bars and lounges in southern Nevada. App. 108a. His ownership and holding of related liquor and gaming licenses has not only been a matter of public record, but also disclosed in numerous judicial disclosure filings with the Nevada Supreme Court since 1982. App. 108a, 122a. Justices Springer and Steffen knew of his bar ownership and neither objected to his sitting on *Hinegardner* or originally to his sitting on petitioner's appeal as they were required to do under Nevada Canon of Judicial Conduct 3(D)(1) if they truly believed his doing so was improper. App. 33a, 112a.

In addition, Justice Rose's ownership of a bar was the subject of intense and pervasive media exposure and commentary throughout Nevada during his 1988 and 1994

reelection campaigns. App. 109a-111a. As the Nevada Supreme Court observed, this "enormous publicity . . . included an entire month of television and radio commercials" encompassing "[l]iterally hundreds of radio and television commercials . . . broadcast throughout Nevada . . . just a month prior to" the Nevada Supreme Court's decision on the merits of petitioner's appeal. App. 25A. The decision sought to be reviewed also cites (and quotes) specific and detailed evidence (never refuted by petitioner's counsel) that petitioner's then counsel had actual knowledge of Justice Rose's bar ownership in June 1994, over five months prior to the decision on the merits of her appeal. App. 20a.[1]

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[1] Petitioner's Appendix to Petition for a Writ of Certiorari omits, not only exhibits to her disqualification motion relevant to the decision sought to be reviewed (see App. 79a), but also all exhibits to Justice Rose's response, including the numerous licenses and public disclosure statements, newspaper articles and radio and television commercials relied on by the Nevada Supreme Court in its decision (see App. 24a-25a) and the specific and detailed affidavit of Clark Santini expressly cited and quoted by the Nevada Supreme Court as establishing that petitioner's then counsel had

However, on July 11, 1994, more than four months prior to the Nevada Supreme Court's decision on the merits of petitioner's appeal, Justice Rose sold the corporation and the bar it owned. App. 108a. Thus, at the time the Nevada Supreme Court rendered its decision on the merits of petitioner's appeal, Justice Rose had no direct, personal, substantial, pecuniary interest in any establishment selling alcoholic beverages and no motion or other challenge to the propriety of his sitting on either *Hinegardner* or petitioner's appeal had been made. Consequently, neither disclosure nor disqualification was required since Justice Rose had no conflict of interest that raised any cognizable grounds for his disqualification from participation on petitioners' appeal. App. 111a, 112a.

In *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 256-270, 774 P.2d 1003, 1017-1026 (1989), and successfully argued by petitioner's present counsel, the

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not merely constructive but actual knowledge of Justice Rose's bar ownership in June 1994 (see App. 19a-21a). A copy of Mr. Santini's three-page affidavit is attached to this Response.

Nevada Supreme Court held that a party with actual or constructive knowledge through its counsel of grounds for disqualification of a Supreme Court Justice waives those grounds by not seeking disqualification before the Supreme Court renders its decision on the merits of the appeal. 105 Nev. at 259-260; 774 P.2d at 1019, 1026. The Nevada Supreme Court then identified a variety of challenges that had been waived in that case based on actual or constructive knowledge from political advertisements, discourse amongst attorneys, newspaper articles, public notices, etc. 105 Nev. at 261-262, 263-264 n.17, 266, 268 N.21, 270 N.22; 774 P.2d at 1020-1021, 1021-1022 n.17, 1023-1024, 1024-1025 n.21, 1026 n.22.

Subsequently, in 1990 the Nevada Supreme Court adopted Rule 35(a) of the Nevada Rules of Appellate Procedure ("NRAP") providing in relevant part as follows:

> Any ground for disqualification or recusal of a supreme court justice that is not raised in a timely manner through the filing of a formal motion or charge shall be deemed waived. In cases or proceedings before the Supreme Court of Nevada, motions and charges

> seeking the disqualification or recusal of a justice must not be based on any ground that the moving party has theretofore omitted to raise formally as soon as possible after receiving either actual or constructive notice thereof. In no event will the supreme court deem timely any motion or charge seeking the disqualification or recusal of a justice who has heard argument upon, or otherwise considered, any contested matter in the cause, except as to grounds based on fraud or like illegal conduct of which the challenging party had no notice until after the contested matter was considered.

See, Whitehead v. Commission on Judicial Discipline, 110 Nev. 380, 422-430, 873 P.2d 946, 972-977 (1994) where Justices Springer and Steffen concurred in rejecting disqualification challenges to themselves (based in part on Federal due process grounds) as both inadequate as a matter of law and untimely under NRAP 35(a). However, in *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 431, 894 P.2d 337 (1995), the Nevada Supreme Court recognized an exception to NRAP 35(a) where the party seeking disqualification did not know, and could not have reasonably known, the

grounds upon which disqualification was sought prior to argument on the appeal.

In the decision sought to be reviewed, the Nevada Supreme Court applied its *Ainsworth* holding to the evidence in the record in concluding that petitioner, through her then counsel, had both actual and constructive knowledge of Justice Rose's prior bar ownership before the Court's decision on the merits of her appeal. The Court then concluded that her allegations, even if true, did not amount to "fraud or like illegal conduct" so that her belated attempt to disqualify Justice Rose after the Court's decision on the merits of her appeal was barred by NRAP 35(a). Finally, the Court also held that Justice Rose did not have the requisite direct, ongoing pecuniary interest to disqualify him from sitting on her appeal and that, since petitioner's allegations did not present legally cognizable grounds for disqualification, a hearing before unchallenged justices were not required, citing *inter alia,* its *Ainsworth* and *Whitehead* decisions. App. 17a-32a.

I. <u>The Petition Fails to Present a Substantial</u>

Federal Question.

The petition cites Nevada statutes and Nevada Canons of Judicial Conduct. However, application of such standards is solely a matter of Nevada state law, which differs significantly from comparable Federal law in some respects (e.g. as to the importance of a judge's "duty to sit") even where identical language is being interpreted. *Compare, Liteky v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147 (1994) and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988) with *PETA v. Bobby Berosini, Ltd., supra, Ainsworth v. Combined Ins. Co., supra,* and *In re Petition to recall Dunleavy*, 104 Nev. 784, 788-791, 769 P.2d 1271, 1273-1276 (1988). Disqualification of state justices on Federal due process grounds must satisfy much more stringent requirements. *See, Aetna Life Ins. Co. V. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580 (1986).

In *Lavoie*, this Court observed that "the traditional common-law rule was that disqualification for bias or prejudice was not permitted," and quoted from its prior

decision in *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 441 (1927) in holding that "not all questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." 475 U.S. at 820, 106 S.Ct. At 1584 (internal quotation marks omitted). Consequently, the Court held that "only in the most extreme of cases would disqualification on [the basis of bias or prejudice] be constitutionally required." 475 U.S. at 821, 106 S.Ct. At 1585.[2]

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[2] Therefore, petitioner's reliance on a letter signed by four bar managers (including the manager of Justice Rose's bar) under their own logos (App. 46a-48a) recommending Justice Rose for reelection and expressing their opinion as to his understanding of the gaming/liquor industry and the significance of *Hinegardner* and other prior decisions is unavailing. Even a judge's critical comments on present issues based on past cases rarely, if ever, provide statutory grounds for disqualification, *Liteky v. U.S., supra*, much less constitutional grounds, *see, Aetna Life Ins. Co. V. Lavoie, supra*, 475 U.S. at 820-821, 106 S.Ct. At 1584-1585 (judge's hostile comments regarding insurance industry's claims payment practices not grounds for disqualification).

However, in *Lavoie* the Court held that due process is implicated where a judge has a "direct, personal, substantial, pecuniary interest" in the outcome of a case that offers a "possible temptation" to the average judge "not to hold the balance nice, clear and true." 475 U.S. at 822, 106 S.Ct. At 1585, quoting *Tumey* and *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83 (1972). Specifically, in *Lavoie*, the Court vacated a 5-4 state supreme court decision first recognizing tortious injury and multi-million dollars punitive damage liability in an insurance bad-faith case where one of the majority justices had filed two pending insurance bad faith actions, one a class action on behalf of state employees. Significantly, however, the Court held that the other justices of the court were not disqualified, despite being putative members of the class, characterizing their interest as "highly speculative and contingent." 475 U.S. at 826, 106 S.Ct. At 1588.

Here, petitioners' action did not concern Justice Rose's establishment in any way, and Justice Rose had not filed, and was not a party to, any litigation comparable to

Petitioner's action. App. 26a.-27a. Unlike *Lavoie*, the law relevant to petitioner's action was well-settled by prior decisions, including one in which Justice Rose had participated without objection. Thus, even prior to July 1994, Justice Rose wholly lacked any direct, personal, substantial, pecuniary interest in the outcome of petitioner's case. His "interest" was comparable to that of a judge owning and using an automobile who rules on automobile products liability, insurance and negligence issues. His insurance costs might be affected and his net worth might increase or decrease depending on future events, but that is hardly the direct, personal, substantial pecuniary interest in the outcome of a particular case required for disqualification on due process grounds.

At the time of the decision on the merits of petitioner's appeal, however, Justice Rose's "interest" was even less. He had sold his ownership interest in the corporation that had owned a bar and thus had no pecuniary interest whatsoever in the outcome of petitioner's action. Speculation that Justice Rose might benefit from lower

insurance costs if the purchaser defaulted and if Justice Rose had to enforce his security interest in the corporation's stock is precisely the sort of remote, indirect, speculative and contingent interest squarely rejected as sufficient for disqualification on due process grounds in *Lavoie*. Future events could cause a judge's rulings to work to his/her benefit or detriment on virtually any aspect of their personal or business affairs. Judges simply could not function if that prospect was sufficient for disqualification. The petition fails to present a substantial federal question.

II. The Decision Below Rests on Adequate State Grounds.

A state supreme-court decision rests on adequate state grounds where assertion of a Federal constitutional right is barred as untimely under a pre-existing state procedural rule given general application that has been applied without discrimination against Federal claims, especially where the state procedural rule serves a legitimate state interest. *See, Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546 (1991); *Henry v. State of Mississippi*, 379

U.S. 443, 85 S.Ct. 564 (1965); *Wolfe v. State of North Carolina*, 364 U.S. 177, 80 S.Ct. 1482 (1960).

Here, NRAP 35(a) unquestionably serves a legitimate state interest, barring the after-the-fact judge shopping petitioner has undertaken below by securing new counsel and filing a motion to disqualify after rendition of a 3-2 decision on the merits of her appeal in a transparent attempt to change the decision by changing the composition of the court. Despite petitioner's highly-selective inclusion and exclusion of materials from the record below in her Appendix to Petition for a Writ of Certiorari, the Nevada Supreme Court's finding that petitioner's prior counsel had both actual and constructive knowledge of the grounds allegedly disqualifying Justice Rose months prior to its decision on the merits of her appeal is fully sustained by the evidence cited in the decision sought to be reviewed. Consequently, NRAP 35(a) is fully applicable here and provides adequate state grounds sustaining the result reached below. *See, Allum v. Valley Bank of Nevada*, 112 Nev. 591, 915 P.2d 895 (1996).

III. <u>The Ultimate Issue to be Decided is Moot</u>.

Since Article III of the Constitution limits the exercise of judicial power by requiring an actual "case" or "controversy", the federal courts, and more specifically, the United States Supreme Court, must refrain from deciding any case in which subsequent events have resolved the pending issues. *See, North Carolina v. Rice*, 404 U.S. 244, 30 L.Ed.2d 413, 92 S.Ct. 402 (1971); *Dinsmore v. Southern Express Co.*, 183 U.S. 115, 46 L.Ed. 111, 22 S.Ct. 45 (1901); *Pennsylvania v. Whelling & Belmont Bridge Co.*, 15 L.Ed.1st 421 (1856), also see S.C. 18 How., 421. In fact, the Supreme Court lacks jurisdiction to decide moot questions. *North Carolina v. Rice, supra.*

In the underlying civil matter which gives rise to the instant Petition, the plaintiff brought suit to recover for injuries which were allegedly caused by the service of alcohol to a minor. However, prior to this suit, the Nevada Supreme Court had on no less than five (5) occasions reaffirmed the common law rule which refused to recognize a cause of action arising out of the sale or furnishing of

intoxicating beverages. *See, Hinegardner v. Marcor Resorts*, 108 Nev. 1091, 1093, 844 P.2d 800 (1992). In so doing, the Nevada Supreme Court expressly stated that any change in this fundamental common law rule would have to come about as a result of a legislative rather than judicial function. *See, Hinegardner v. Marcor Resorts, supra*, at 1096.

In 1995, the Nevada legislature enacted N.R.S. 41.1305 which expressly and specifically precluded any action such as that filed by the plaintiff in the underlying matter. Rather than abrogating the common law immunity, the Nevada legislature expressly reaffirmed the long-standing common law rule.

Following the enactment of 41.1305, the uncertainty which followed the Nevada Legislature's silence on the issue was eliminated. The smallest of openings which had been left open by the Nevada Supreme Court's repeated reference to deferral to the legislature was gone. The Nevada legislature expressly rejected the possibility of exposing a provider of alcohol to civil liability thus

resolving any potential issue which might ultimately face the Nevada Supreme Court.

By enacting N.R.S. 41.1305, the Nevada Legislature has rendered moot any claim which the plaintiff might present in the underlying matter. As such, even if this Court were to grant certiorari and ultimately reverse the Nevada Supreme Court's decision on the post-decision motion to disqualify Justice Rose, the Nevada court's decision would necessarily be the same as that which is the subject of the instant challenge. Clearly the issue has been rendered moot by the actions of the Nevada Legislature.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

COMES NOW, Clark Santini, and being duly sworn, deposes and says:

1. I am a native Nevadan presently residing in Washoe County.

2. My primary employment as an adult has been as an investigator in the State of Nevada; first, as an investigator with the Clark County District Attorney's office, and then many years as an assistant chief investigator with the Gaming Control Board. In addition to employment as a public investigator, I have worked as a hearing officer and administrative law judge for six years (three years for Gaming Control, two years for the Equal Rights Commission, and one year in the Employment Security appeals office) and as a Chief Tribal Judge in the court of general jurisdiction for the Paiute tribe at Nixon, Nevada. I have also worked the past twenty years as a political and

public relations consultant.

3. In early June, 1994, attorney Ken McKenna, of Washoe County, asked to meet with me concerning some political advice about his running for a political office in Washoe County. I met with him for a lengthy lunch at the Holiday Hotel in Reno, Nevada, on June 6, 1994.

4. During that meeting, he informed me he was seriously considering running for a political office in Washoe County and wanted to retain me as his political consultant for the campaign. During this meeting, we discussed a variety of matters concerning his candidacy.

5. Near the end of our meeting, he was discussing his law practice and the fact that he had three important legal cases from the Hawthorne area. He voluntarily discussed all three briefly. The first involved the Sheriff and his office and the fact that the Sheriff or his deputies had killed a man's girlfriend when attempting to serve a subpoena or warrant on him. McKenna told me he had gotten a large settlement in this case. The second was a case involving a minor who was served liquor at Joe Viani's

bar and then killed himself and others in an automobile accident thereafter. McKenna indicated he had lost the case in district court but had appealed it to the Nevada Supreme Court. He indicated that he was uncertain about the Supreme Court result and elaborated. McKenna stated that he knew Justice Steffen was a Mormon and always voted against the bars in these types of cases, but McKenna said he did not know how he would fare with Justice Rose because he knew Justice Rose owned a bar in Las Vegas. However, he gave me the impression that he did not necessarily think Justice Rose would be biased. It was unmistakable that Ken McKenna knew in June, 1994, that Justice Rose owned a bar in Las Vegas. The last case evolved from the Mineral County District Attorney having delayed in filing a sexual assault case involving a 15-year-old girl for what McKenna believed were political reasons.

6. It was agreed that Ken McKenna would send me a check for my consultation, and he did so with a check dated June 13, 1994. A copy of that check is attached.

7. By mid-July, 1994, McKenna advised me he no

longer needed any political consulting services from me. I later did political consulting services for Justice Bob Rose in Washoe County for his campaign for re-election.

8. On February 22, 1995, I read the Reno News & Review newspaper and the article about the Joe Viani case and the attempt to disqualify Justice Rose. When I read the part about the driver's estate and Ken McKenna claiming to be totally unaware that Justice Rose owned a bar in Las Vegas prior to the decision, I knew it was not true as regarding McKenna and phoned Justice Rose to tell him that. I informed him of the facts as related to this affidavit and offered to sign an affidavit to that effect.

9. The above facts are true and correct to the best of my knowledge.

/s/ Clark Santini

SUBSCRIBED AND SWORN to
before me this 3rd day of March, 1995.

/s/ Susan C. Davis
Notary Public